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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 40

DONALD WADE, PETITIONER,

vs.

NATHAN MAYO, AS STATE PRISON CUSTODIAN OF THE STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1947.

CERTIORARI GRANTED JUNE 9, 1947.

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IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, JACKSONVILLE DIVISION.

#845-J-Civ.

Filed May 10, 1946.

DONALD WADE,

Petitioner,

versus

NATHAN MAYO, as State Prison Custodian,

Defendant.

PETITION FOR WRIT OF HABEAS CORPUS.

To: The Honorable Louie W. Strum, Judge of the United States District Court for the Southern District of Florida, Jacksonville Division:

Now comes your petitioner, Donald Wade, and respectfully represents unto Your Honor that he is restrained of his liberty by the Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, and state prison custodian of the State of Florida, contrary to the laws and Constitution of the United States of America. Your petitioner shows as follows:

1.

Your petitioner was informed against in the Criminal Court of Record in the County of Palm Beach, State of Florida, for the offense of breaking and entering.

2.

Your petitioner was brought on for trial in the Criminal Court of Record in Palm Beach County, Florida, upon the

charge of breaking and entering, and when his case was called for trial, your petitioner stated to the Judge that he was without money with which to employ counsel and asked the Court to appoint counsel for his defense before the trial of the case began, which request of your petitioner was denied.

3.

Your petitioner shows that he is eighteen years of age and that the only education he has had is in the common schools through the eighth grade, and that he knows nothing about the procedure and practice in the Courts, and he was forced to trial without the aid of counsel in violation of the constitutional rights as guaranteed to him under the Constitution of the United States, and without due process of law he was tried, convicted and sentenced to a term of five years in the state penitentiary of Florida where he is now held.

4.

Your petitioner further shows that he is advised and believes an appeal to the Supreme Court of Florida would be of no avail and would be useless for the reason that the Supreme Court of Florida has decided in the case of Watson vs. The State, 194 Sou. 640, and Johnson vs. The State, 4 Sou. (2nd) 671, that it has no power of reversal of a conviction because defendants were not represented by counsel, and for that reason failed to obtain a fair trial, except in capital cases, and this case is not a capital case.

5.

Your petitioner further shows that he was without any funds whatsoever to employ counsel in his behalf, and

that the only recourse he had was to ask that counsel be appointed to represent him in the trial of said cause.

6.

Your petitioner further shows that in order to exhaust all of his remedies in the State Courts before appealing by writ of habeas corpus to the District Court that he filed a petition for writ of habeas corpus which writ was granted and that the same was quashed upon motion before the Honorable Jos. S. White, Judge of the Circuit Court, of Palm Beach County, Florida, a copy of said order being hereto attached, marked petitioner's exhibit "A", and made a part of this petition.

7.

Your petitioner further shows that appeal was made to the order quashing the writ of habeas corpus to the Supreme Court of Florida and the Attorney General filed a motion to dismiss said appeal, a copy of which motion is hereto attached, marked petitioner's exhibit B, and made a part of this petition.

8.

Whereupon, the Supreme Court of Florida considered the motion to dismiss and by order of said Court dismissed the said appeal, copy of which is hereto attached, marked petitioner's exhibit C, and made a part of this petition.

9.

Your petitioner further shows that he is advised and believes that he has exhausted every remedy available to him in the State Courts of Florida, and the Courts of last

resort in Florida, and there is no way in these Courts to obtain the redress for the wrong committed against him in denying him due process of law as guaranteed under the Constitution of the United States.

10.

Your petitioner further shows that he is not guilty of the charge made against him, and that if he had had counsel to represent him, and present his defense, he verily believes that he would never have been convicted of the crime with which he was charged, and given the sentence of five years in the state penitentiary.

11.

Your petitioner further shows that he is being held in the State Road Prison Camp, under the Honorable Nathan Mayor, as Commissioner of Agriculture and as State Prison custodian, in Suwanee County, Florida, and deprived of his liberty by reason of the sentence issued in the Criminal Court of Record in Palm Beach County, Florida, wherein he was tried without the benefit of counsel, and delivered to the said State Prison custodian.

Wherefore, your petitioner prays that Your Honor grant unto him the United States most gracious writ of habeas corpus, to be delivered to the said Nathan Mayo, as State Prison custodian of Florida, and returnable forthwith before Your Honor according to the form in the statute in such case made and provided, and then and there to show cause why he holds your petitioner unlawfully in custody, and upon what legal grounds he seeks to deprive your petitioner of his liberty and his right to a fair trial with-

out the aid of counsel, and petitioner prays, upon final hearing, he may be discharged from further custody.

(S.) DONALD WADE,
Petitioner.

State of Florida,
County of Suwanee.

On this day personally appeared before me, the undersigned authority, Donald Wade, who being first duly sworn, deposes and says that he is the petitioner in the foregoing cause, and that he has read the above petition and that the facts therein set out are true.

(S.) DONALD WADE.
(S.) H. B. WOOLEY,
(Notary Seal) Notary Public, State of Florida at Large.

My commission expires: March 8, 1947.

4 PETITIONER'S EXHIBIT A.

Order Quashing Writ.

In the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County.

Donald Wade, Petitioner,
vs.
John Kirk, as Sheriff of Palm Beach County, Florida, Respondent.

This cause was heard, after due notice, upon the Motion of the State Attorney to quash the writ of Habeas Corpus, and argument of counsel.

In consideration of the premises, it is Ordered and Adjudged that the Motion is granted and the Petitioner is remanded to the custody of the Sheriff of Palm Beach County, Florida. See Watson v. State, 142 Fla. 218, 194 So. 640; Johnson v. State, 148 Fla. 510, 4 So. (2d) 671.

Done And Ordered this March 22nd, A. D. 1945.

JOS. S. WHITE,
Circuit Judge.

5

PETITIONER'S EXHIBIT B.

Motion to Dismiss Appeal.

In the Supreme Court of Florida.

Donald Wade, Appellant,
vs.
John Kirk, as Sheriff of Palm Beach County, Florida, Appellee.

Comes now the appellee by its undersigned attorneys, and shows unto the Court that the transcript of record filed herein reveals the following facts, to-wit:

That on March 15, 1945, the appellant was tried, convicted, and sentenced for breaking and entering, not a capital offense.

That on the next day, to-wit: March 16, 1945, the appellant filed his petition for habeas corpus in which he raises the single point that he was unable to employ counsel because of the lack of funds and that the Court denied his request that counsel be appointed for him.

That it does not appear that the appellant took any appeal or that he even filed a motion for new trial.

That the Circuit Judge made his order quashing said writ of habeas corpus and remanding the appellant upon the authority of decisions of this Court cited in said order.

Wherefore, the appellee says that the appeal taken herein is frivolous and without merit, and could serve no purpose other than to obstruct and delay justice; and the appellee moves the Court to dismiss said appeal.

Respectfuly submitted.

J. TOM WATSON,
Attorney General.
REEVES BOWEN,
Assistant Attorney General,
Attorneys for Appellee.

6 PETITIONER'S EXHIBIT C.

In the Supreme Court of Florida, January Term, A. D. 1945.

Monday, May 14, 1945.

Donald Wade, Appellant,
vs.
John Kirk, as Sheriff of Palm Beach County, Florida, Appellee.

Upon consideration of the motion of the Attorney General as counsel for appellee in the above cause to dismiss the appeal therein, it is ordered that said motion be and the same is hereby granted and the appeal which

was entered in this cause in the Circuit Court of Palm Beach County of March 23, 1945 and recorded in minutes of said Court Book 51, page 145 be and the same is hereby dismissed.

A true Copy.
Test:
(SS)
Clerk Supreme Court.

APPLICATION FOR DONALD WADE FOR LEAVE TO SUE AS A POOR PERSON.

7 Filed May 10, 1946.

In the District Court for the Southern Division of Florida, Jacksonville Division.

Donald Wade, Petitioner,
vs. #845-J-Civ.
Nathan Mayo, as state prison custodian, Defendant.

To the United States of America, Southern District of Florida, Jacksonville Division:

Donald Wade, being first duly sworn, deposes and says that he is a citizen of the United States and of the State of Florida; that he is entitled to and intends to commence an action in this Court against Nathan Mayo, a citizen of the State of Florida, in the matter of a habeas corpus petition asking for habeas corpus writ, and that the proposed petition for writ is exhibited along with this affidavit; that affiant is without any assets and that he has no income whatsoever but is being held in the State Penitentiary; that because of his Poverty

affiant is unable to pay the costs of said action or to give security therefor; that there is no other person interested in the said cause of action, or recovery thereunder, and that affiant believes and he is entitled to the redress to be sought in the said action.

Wherefore, affiant prays that he may have leave to prosecute the said action without being required to prepay costs or fees or to give security therefor, pursuant to U. S. C. Title 28, Sections 832-836.

DONALD WADE,
Petitioner.

Subscribed and sworn to before me this the 26 day of April A. D. 1946.

H. B. WOOLEY,
(N. P. Seal) Notary Public, State of Florida at Large. (Seal)

My commission expires: March 8, 1947.

8

ORDER.

Filed May 10, 1946.

(Title Omitted.)

The Court having read and considered the petition herein, and supporting affidavits, it is—

Ordered And Adjudged:

1. Petitioner's motion for leave to proceed in forma pauperis is granted.

2. The respondent, Nathan Mayo, as State Prison Custodian, shall produce the body of petitioner, Donald Wade, before this Court at Jacksonville, Florida, on Friday, May 17, 1946, at eleven o'clock AM, together with cause and authority for detention of said Donald Wade, then and there to be heard and dealt with in accordance with law.

3. At same time and place the Court will hear all witnesses for all parties, so that the matter may be considered and disposed of on the merits.

Done And Ordered at Jacksonville, Florida, May 10, 1946.

(Sgd.) LOUIE W. STRUM,
(Louie W. Strum)
U. S. District Judge.

(Recorded in Jacksonville Civil Order Book No. 9, page 771.)

Copies—
Eugene M. Baynes, Comeau Bldg., West Palm Beach.
Hon. J. Tom Watson, Attorney General, Tallahassee.
Hon. Nathan Mayo, as State Prison Custodian, Tallahassee.

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9 RETURN OF RESPONDENT.

Filed May 17, 1946.

(Title Omitted.)

Comes now the respondent, Nathan Mayo, as Commissioner of Agriculture and State Prison Custodian of the

State of Florida, and for return to the petition for writ of habeas corpus and the order of this Honorable Court pursuant thereto, says:

That he holds the petitioner, Donald Wade, in custody under and by virtue of commitment which issued out of the Criminal Court of Record of Palm Beach County on the 14th day of March, 1945. Said commitment requires the respondent to hold said petitioner until the latter has served a term of five years in the State Prison of Florida, which was imposed on him by said Court upon his conviction for the offense of breaking and entering with intent to commit grand larceny. That a true and correct photostatic copy of said commitment is attached hereto as Exhibit 1 and is hereby made a part hereof.

That the petitioner has not served the term of imprisonment imposed by the sentence upon which said commitment is predicated, and he is lawfully restrained of his liberty under said commitment.

That information was filed against the petitioner for said offense on the 19th day of February, 1945, and he was duly arraigned under said information and plead not guilty thereto. That the case was thereupon set for trial and he was informed that any witnesses desired by him for his defense would be subpoenaed. That, in response, he stated that he had no witnesses which he wished subpoenaed in his behalf.

That the case duly came on for trial on March 14, 1945. That at no time prior to the calling of said case for trial on said date did the petitioner make any request that the Court appoint counsel to defend him. That, at the time said case was called for trial on said

date, the petitioner for the first time requested the Court to appoint such counsel, which request was properly denied by the trial Court.

That during the process of impaneling a jury to try the case, the petitioner was advised of his right to challenge jurors and was advised that he could excuse as many as six jurors from serving in his case without assigning any reason therefor. That, after the petitioner was so advised, he accepted a jury tendered by the State with the statement to the effect that they were agreeable to him, and said jury was thereupon duly sworn.

That at the trial the State produced evidence quite sufficient to sustain the verdict of guilty rendered by the jury. That two of the State's witnesses admitted their participation in the breaking and entering charged against the petitioner, and both testified that they and the petitioner jointly committed said crime.

That the petitioner during the progress of the trial was afforded opportunity and advised of his right to cross examine the witnesses presented by the State, but declined to exercise the right or to avail himself of the opportunity.

That the petitioner took the stand and testified fully in his own behalf. That his defense was that, being in the company of the two above mentioned State witnesses until just before the commission of the crime charged against him, he left them prior to the commission of the crime and did not participate in it in any way.

That no argument was made to the jury in the case by either side.

That the trial judge charged the jury fairly and in accordance with law, and said jury returned a verdict of guilty which is the basis of the petitioner's conviction, sentence and commitment.

That the petitioner was not a stranger to criminal procedure, he having plead guilty in November, 1943, to a charge of burglary then pending against him in the Circuit Court of Jackson County, Florida, and having served a portion of the sentence of imprisonment in the State Prison imposed upon him for said offense.

That petitioner was also committed to reform school on charge of breaking and entering, from which institution he escaped. That petitioner was upon another and different occasion convicted of petty larceny upon which judgment of conviction sentence was withheld.

Respondent denies the allegations of paragraph 5 of the petition filed herein that the only recourse the petitioner had was to ask that counsel be appointed to represent him in the trial of the cause and says that the petitioner was arraigned before the Court under the information charged against him on a day several weeks in advance of the day upon which the trial was had and that upon said arraignment the petitioner plead "not guilty". That upon a later date the defendant being in Court the case was assigned for trial upon a future day certain. That upon neither occasion did the petitioner make any request for the appointment of counsel to assist him in his defense or any representation to the Court that he was without funds or resources with which to employ counsel. That on the contrary during the time intervening between the date of his arraignment and the date of the trial the petitioner, through his efforts and those of others of his relatives, did endeavor

to enlist the services of attorneys to undertake the defense of the petitioner against the charges upon which information was presented against him, but that such efforts were vain for the reason that the facts and circumstances gave no promise of successful defense of the charges preferred.

That the petitioner is literate and intelligent. That he was kept advised of his rights as the trial progressed. That he fully presented his defense and received a fair and impartial trial.

That the respondent denies that the petitioner's constitutional rights were violated by the trial Court's denial of his request that counsel be appointed for his defense. That the respondent further denies that the petitioner was tried, convicted and sentenced without due process of law.

That on March 16, 1945, subsequent to the conviction and sentence of the petitioner, he filed in the Circuit Court of Palm Beach County, Florida, his petition for writ of habeas corpus in which he made substantially the same allegations as are contained in his petition herein, and in which he alleged that the refusal of the trial Court to appoint counsel for him was a denial of due process of law guaranteed to him by the Constitution and laws of the United States of America. That a true copy of said petition is attached hereto as Exhibit 2 and is hereby made a part hereof. That, as alleged in the petition herein, a writ of habeas corpus was granted by said Circuit Court. That, as is alleged in the petition herein and as is shown by Exhibit A made a part thereof, said Circuit Court made its order quashing said writ. That, as is alleged in said petition, the petitioner took an appeal from said order and the Supreme Court

of Florida dismissed said appeal. That said order is in full force and effect, and is an adjudication that due process of law was not denied the petitioner contrary to the Constitution and laws of the United States by the trial Court's refusal to appoint counsel for him. That said adjudication is binding upon the petitioner unless and until reversed in appropriate appellate proceedings, and is res judicata.

That at the time of the trial referred in the petition now before the Court petitioner was under parole granted under the laws of the State of Florida, conditioned as provided by the said parole laws. That in the execution of the sentence imposed upon the petitioner under the judgment of conviction in the Circuit Court of Jackson County, the petitioner was subject to confinement in the State Prison for a period of two years from and after the 10th day of November 1943. That on the 5th day of September, 1944, the petitioner having served nine months and twenty-five days of his sentence, he was released under parole as aforesaid. That on the 30th day of March, 1945, the petitioner was, for violation of the conditions of his parole, retaken and reconfined in the State Prison to serve the remainder of his two year sentence imposed by the Circuit Court of Jackson County. That at the time of his reincarceration on March 30th, 1945, the petitioner had yet to serve under his two year sentence a period of 14 months and 5 days, which period does not expire until the 4th day of June, 1946, and the petitioner is still in custody under the sentence imposed by the Circuit Court of Jackson County, Florida.

That the respondent denies that the petitioner is restrained of his liberty contrary to the laws and Constitution of the United States of America.

(Sgd.) NATHAN MAYO,
(Nathan Mayo)
As State Prison Custodian,
Respondent.

(Sgd.) J. TOM WATSON,
(J. Tom Watson)
Attorney General.
(Sgd.) T. PAINE KELLY,
(T. Paine Kelly)
Assistant Attorney General,
Counsel for Respondent.

MOTION TO QUASH WRIT OF HABEAS CORPUS.

Filed May 17, 1946.

(Title Omitted.)

Comes now the respondent, Nathan Mayo, as State Prison Custodian for the State of Florida, and moves the Court to quash the writ of habeas corpus issued and entered by the Court on the 10th day of May, 1946, in the above cause for the reason that the petition filed by the petitioner herein is insufficient upon which to entitle the said petitioner for the extraordinary relief prayed for in the following respects:

1. That the petition fails to allege or show that the petitioner during the period of time which elapsed between the time of his arraignment and the time when his case was called for trial made any request for the appointment of counsel or to acquaint the Court with the fact that he was not financially able to secure the services of counsel.

2. The petition fails to allege or show that the petitioner had made any effort during the time which elapsed between the date of his arrest and the date of his trial to solicit the aid of any person either through acquaintance, relationship or otherwise to assist him in the securing of counsel or to arrange in his behalf for the securing of counsel.

3. The Petition fails to allege or show that any request was made upon the Court for the continuance of the trial of the case nor the postponement thereof to enable the petitioner to secure counsel or to arrange for the securing of counsel.

4. The petition fails to allege or show that there was no source from which the petitioner might or could secure funds with which to employ counsel to aid in the presentation of his case on trial.

5. The petition fails to allege or show that the petitioner was without property or any other thing of value from which money might or could have been secured with which to employ counsel to aid in the presentation of his case.

6. The petition fails to allege or show either that the age of the petitioner or the extent of his education was insufficient to acquaint him with a realization of his legal rights and the manner in which the same might be presented and defended in a Court of justice.

7. The petition fails to allege or show that the alleged unfamiliarity of the petitioner with the rules of procedure and practice governing the trial under criminal charges in any way interfered with or prevented the presentation by the petitioner of the facts based upon truth in his defense against the charge.

8. That the petition fails to allege or show that at the time of the petitioner's request as alleged in his petition for the appointment of counsel to assist him in his defense he was not familiar with the rules governing practice and procedure in the trial of cases involving violation of the criminal law.

9. It appears from the records of this Court in the case presented that a former petition was addressed by this petitioner to the Court for the issuance of a writ of habeas corpus to effect the discharge of the petitioner from the custody of the respondent under the judgment of conviction and commitment from which his presnet petition seeks a writ. That upon such application for writ of habeas corpus the writ was denied for the reason that the petitioner was then in custody of the respondent under judgment of conviction and commitment upon a former charge of the commission of a criminal offense previously committed and this petition fails to allege or show that the sentence imposed upon the petitioner as punishment for the said former offense has been fully served or completed and that the term for

which the petitioner was confined under the said former offense has terminated.

(Sgd.) NATHAN MAYO,
(Nathan Mayo)
As State Prison Custodian,
Respondent.

(Sgd.) J. TOM WATSON,
(J. Tom Watson)
Attorney General.
(Sgd.) T. PAINE KELLY,
(T. Paine Kelly)
Assistant Attorney General.
Counsel for Respondent.

16 TRANSCRIPT OF PROCEEDINGS.

D. Filed Jun. 14, 1946.

Upon the Hearing of said Matter before His Honor Louie W. Strum, Judge of the above Court, commencing at eleven o'clock in the forenoon, Friday, May 16, 1946.

Appearances:

E. M. Baynes, Esq., appearing on behalf of the Petitioner.

T. Paine Kelly, Esq., appearing on behalf of the Respondent.

The Court:

All right, gentlemen, we will take up this Donald Wade matter now. Donald Wade. Have you got a return, here?

Mr. Kelly:

The respondent has filed a return and motion to quash the petition. We would have filed it earlier, but we did not receive the order until Tuesday of this week—the writ, until Tuesday of this week.

The Court:

(Having examined the file.) All right, gentlemen, I will take the motion to quash under advisement, and you can present it along with the rest of the case and I will rule on all sections at the end of the hearing.

Mr. Baynes:

I would like for the petitioner to be sworn, Your Honor.

The Court:

This return alleges he still is in custody under the wrong sentence?

Mr. Baynes:

It alleges he is in custody under sentence on the case on which he was tried in Palm Beach County, to which we have taken exception.

The Court:

The sentence under which he is held, expires June 4, 1946. Of course, that time is not far off.

Mr. Baynes:

If your Honor please, I would like to offer in evidence a letter from Mr. Mayo, showing that the expiration of his prior sentence, expired on April 20, 1946.

The Court:

Let me see it. Mr. Kelly, did you explain to these gentlemen that they had until June 6th, on this sentence?

Mr. Kelly:

Yes, your Honor. It is a question of mathematics. He was committed to serve a 2-year sentence. He was pardoned on a certain day, after having served a portion of his term. He broke parole on a certain day and was re-committed on the 30th of March of this year. The period of time that he had to serve, when he was re-committed, to fill out his 2-year sentence, does not expire until the 4th of June of this year.

The Court:

Well, that time is so near at hand, I think I will go ahead and hear the merits of the case, and then I can do whatever the law requires, at the time I find from the evidence the sentence will expire; and save everybody the trouble and expense of coming back. Proceed with the evidence in support of your petition. You may file this.

. . . The instrument last above referred to was received and filed in evidence and marked Petitioner's Exhibit No. 1 (being letter of Mr. Mayo referred to.)

The Court:

Bring on your evidence now, to sustain this petition.

Mr. Baynes:

On that question of the expiration of the sentence—pardon me, I want to get a few letters I have written.

The Court:

Well, pass that for the time being. I will hear the merits of the case and if I find the time has not expired, I will determine when it does expire. Let us hear the merits in this case and what they involve.

19 PETITIONER'S CASE.

Mr. Baynes:

I have here a certified copy of the transcript of the habeas corpus proceedings in the Circuit Court of Palm Beach County which gives a history of this case, and which I propose to introduce in evidence, if your Honor please, to show that the matter has been taken before the Courts of Florida.

The Court:

Well, I understand that is admitted. That is set up in the return of the respondent here—I believe that is in here. You do not deny that, do you, Mr. Kelly?

Mr. Kelly:

No, your Honor.

The Court:

All right.

Mr. Baynes:

Then, in the Supreme Court of Florida, a motion to dismiss the appeal, and the judgment of the Supreme Court of Florida is admitted, I think. I think those matters should go into the record.

The Court:

All right, file the judgment of the Circuit Court and the Supreme Court of Florida denying the writ.

Mr. Baynes:

Also the motion to dismiss the apppeal and the order dismissing the appeal, by the Supreme Court of Florida.

. . . The instruments last above referred to were received and filed in evidence and marked Petitioner's Exhibits Numbers 2 and 3 respectively.

DONALD WADE, the petitioner herein, having been produced and first duly sworn as a witness in his own behalf, testified as follows:

20 Direct Examination.

By Mr. Baynes:

Q. Your name is Donald Wade?

A. Yes, sir.

Q. How old are you at the present time, Mr. Wade?

A. 19.

Q. When were you arrested in Palm Beach County, Florida, upon the charge of breaking and entering?

A. February 19, 1945.

Q. 1945?

A. Yes, sir.

Mr. Kelly:

Your Honor, might I ask the witness to speak a little louder?

The Court:

Yes, speak up so everybody can hear you.

Mr. Baynes:

Q. Speak up, Donald, so everybody can hear you. When were you arrested?

A. February 19, 1945.

Q. That was in Palm Beach County, Florida?

A. Yes, sir.

Q. Were you ever tried upon that charge of breaking and entering?

A. The same charge, or any other charge?

Q. The same charge.

A. No, sir.

Q. What charge were you tried upon?

A. Breaking and entering?

Q. Is that what you were arrested for in February 1945?

A. Yes, sir.

Q. How old were you at that time?

A. 18. Come 18, the 13th of February.

Q. In 1945?

A. Yes, sir.

Q. After you were arrested, where did they place you?

A. Palm Beach County jail.

Q. How long were you held in jail?

A. Held until March 14.

Q. What year?

A. 1945.

Q. What happened on that date?

A. I was tried.

Q. Where were you tried?

A. Palm Beach County Court House.

Q. In the Criminal Court of Record of that county?

A. Yes, sir.

Q. How much education have you had?

A. Eighth grade.

Q. Are you familiar with the Court practice and how to proceed in the trial of a case in Court?

A. No, sir.

Q. When did you—did you have a counsel to represent you in the trial of this cause?

A. No, sir.

Q. Did you try to get an attorney to represent you?

A. Yes, sir.

Q. Who tried for you?

A. No one.

Q. I say, who tried to get counsel for you, to represent you?

A. My mother and father tried, but they were unable to get one.

Q. Why?

A. They didn't have no—

Mr. Kelly:

If the Court please, I do not want to get captious, because I know the Court is as anxious as we are to have these facts discussed, but I do not see how this witness can intelligently reply how someone else made an effort, and what effort they made.

The Court:

Yes, that would be hearsay on the part of this witness.

Mr. Baynes:

Q. Do you have any property of your own?

A. No, sir.

Q. Do you have any money of your own?

A. No, sir.

Q. Did you have any, at that time?

A. No, sir.

Q. Did you have any property of your own at that time?

A. No, sir.

Q. Were you able to employ counsel to represent you in the Criminal Court of Record of Palm Beach County?

A. No, sir.

Q. When did you first—or, did you ever ask the Court to appoint counsel for you in the trial of this cause?

A. Yes, sir.

Q. When did you do that?

A. March 14, the day I was tried.

Q. Was that before the trial began?

A. Yes, sir.

Q. Why had you not asked the Court prior to that time?

A. Well, I had never been over there before and thought my mother and father would get one for me.

Q. You were up there without counsel, and before the trial of the case, you asked the Judge to appoint you a lawyer to represent you?

A. Yes, sir, the Judge and Mr. Roebuck.

Q. Did the Judge make any remark to you at the time?

A. No, sir, he didn't.

Q. You just asked for counsel, and what did the Judge reply?

A. He told me I didn't need one.

Q. And you went to trial and were convicted before the jury without a lawyer representing you, at that time?

A. Yes, sir.

Mr. Baynes:

You may examine.

Cross Examination.

By Mr. Kelly:

Q. Do I understand you, Donald, to say that the reason that you did not make request upon the Court, or any of the Court's officers for the appointment of counsel to assist you in your defense until the day of the trial, was because you had not been over there prior to that time?

A. Yes, sir.

Q. Where were you arraigned?

A. I wasn't arraigned, that I can remember.

Q. You can't remember your arraignment?

A. No, sir.

Q. Do you know what an arraignment is? Do you not?

A. No, sir, not exactly.

Q. Not exactly?

A. No, sir.

Q. What is your conception of the process of arraignment?

A. I can't understand yet. I don't know.

Q. Do you recall on February 20, 1945, going into the Court Room in the presence of the Judge of the Court and the prosecuting attorney, answering to your name and being advised on the charge under which you were held in custody, and a request that you plead guilty or not guilty?

A. It was in the District Attorney's room, wasn't it. Mr. Roebuck's room?

Q. Do you recall being arraigned? Do you recall being called before the Court?

A. No, sir, I don't.

Q. And having the indictment read to you?

A. No, sir, only on the 14th of March.

Q. Were you in the Court room on March—the day in March on which your case was set for trial?

A. No, sir, the only two days I was over there was the day I was tried, which was March 14th, and sentenced the next day, which was March 15th.

Q. You state that they were the only two occasions upon which you were in the Court Room in Palm Beach County, the Court Room of the Criminal Court of Record?

A. No, sir, I had been in there before, but not on this same charge.

Q. When were you there before, on other charges?

Mr. Baynes:

If your Honor please, that is immaterial and irrelevant to this charge.

Mr. Kelly:

It is relevant to determine whether or not the witness was in the Court Room.

The Court:

Overruled. Proceed.

. . . The question was read.

A. I was there in November, '44.

Mr. Kelly:

Q. When were you arrested on the charge of breaking and entering upon which you were tried in Palm Beach County, Mr. Wade?

A. February 19.

Q. February 19?

A. 1945.

Q. You were taken to the County jail in Palm Beach County at the time of your arrest?

A. No, sir.

Q. Where were you taken?

A. Palm Beach police station.

The Court:

You say you were arrested in February or January?

A. February.

Q. Of 1945?

A. Yes, your Honor.

By Mr. Kelly:

Q. On the 19th of February?

A. Yes, sir.

Q. Your recollection is clear on that?

A. Yes, sir.

Q. On the next day, were you not taken to the County Court House, to the Court room of the Criminal Court of Record of Palm Beach County?

A. On the same day I was turned over to the County, over in Mr. Roebuck's office, and then taken to the Palm Beach County Jail.

Q. Well, when was the first time that you were taken, or that you appeared in the Court Room in Palm Beach County?

A. February 14.

Q. That is your recollection?

A. Yes, sir.

Q. You have answered counsel, in answer to a question as to your familiarity with Court procedure. Your answer was a categorical no. Have you ever had any experience with Court procedure, or had you had prior to the occasion on which you were tried in Palm Beach County?

A. Yes, sir, I was tried and sentenced before. I never pled not guilty; never knew Court procedure. Just going before the Judge and being sentenced.

Q. On how many occasions have you been tried in other Courts than the Court of Palm Beach County?

A. One time.—Besides the Court in West Palm Beach, and I was tried in 1943 in Palm Beach County.

Q. In Palm Beach County?

A. Yes, sir.

Q. You were tried in Jackson County, were you not?

A. Yes, sir.

Q. When was that?

A. That was in November, 1943.

Q. You appeared, then, in Court, before the Court and jury?

A. No, sir, no jury.

Q. No jury?

A. No, sir.

Q. On that occasion you plead guilty to the charge?

A. Yes, sir.

Q. You were familiar, then, with the procedure of arraignment and in the entry of a plea, were you not? Prior to the time when you were apprehended for the offense in Palm Beach County?

A. Yes, sir, I knowed to plead guilty or not guilty.

Q. How is that?

A. I knowed to plead, yes, sir.

Q. When did you plead in this case in Palm Beach County?

A. March 14.

Q. You did not enter a plea to that charge until the day you were tried?

A. Except Mr. Roebuck.

Q. Mr. Roebuck was who?

A. The prosecuting attorney.

Q. The Court officer, was he not?

A. Yes, sir.
Q. You did enter a plea before him?
A. To him, yes, sir.
Q. Where was that done?
A. In his office.
Q. When?
A. The day that I was picked up and arrested, March —February 19.
Q. The day you were picked up and arrested?
A. Yes, sir, and turned over to Palm Beach County.
Q. You entered a plea on that day?
A. To him, yes, sir.
Q. What plea?
A. Not guilty.
Q. Do you know when the information against you was entered in the Court records?
A. No, sir, I don't.
Q. Did you, yourself, make any effort during the time elapsing between the date of your arrest and confinement, until the date of your trial, to secure the services of counsel?
A. Only through my father and mother. I tried to get them to get one.
Q. Did you consult with any counsel at all during that period of time?
A. No, sir.
Q. At the jail?
A. No, sir.
Q. Or at any other place?
A. No, sir.
Q. Were you represented by counsel on any of the previous occasions upon which you were convicted of violations of the criminal code?
A. No, sir.
Q. Donald, I understand you to say that you are entirely unfamiliar with Court procedure. How did you

determine that you had a right to request of the Court that counsel be assigned to your case and in your defense?

A. Well, my mother and father told me that I had a right to, and, they couldn't get one for me.

Q. How long was that prior to the trial?

A. I can't remember.

Q. You were informed, then, by your parents, that it was the duty of the Court to appoint an attorney to assist you in your defense?

A. I said, the Court would probably give me one if I would ask for one.

Q. Did anyone else inform you of the right?

A. No, sir.

Q. Did you, at the time of making the request of the Court for the appointment of counsel to assist you in your defense, know what would be the result of the Court's denial of your request?

A. No, sir.

Q. Had you been informed by anyone?—With respect to the effect of the denial by the Court to grant your request for counsel?

A. No, sir.

Q. Do you recall when—how soon after the trial you were advised of the fact that the Court erroneously denied your request for counsel?

A. All I know is that I was tried without a counsel.

Mr. Kelly:

Will you read the question?

. . . The question was read.

A. No, sir, I don't.

Mr. Kelly:

Q. Was it that same day?

A. No, sir, they didn't never tell me that I couldn't have one except when I asked them. They never didn't tell me that they wasn't going to give me one.

Q. Donald, I am afraid you are not answering and listening to my question. When did you learn that the Court should have appointed counsel upon your request? How soon after the trial did you learn that it was the opinion of someone that the Court should have granted your request?

A. It was after Mr. Baynes came over to see me.

Q. When was that?

A. I don't remember exactly how many days it was after the trial.

Q. Do you recall executing a petition for writ of habeas corpus to be presented to the Circuit Court of Palm Beach County?

A. Yes, sir.

Q. Do you recall how soon after your trial, that petition was executed by you?

A. No, sir, I don't.

Q. Have you any idea of the number of days that had elasped?

A. No, sir, I don't. I imagine 9 or 10 days or more.

Q. When were you taken to Raiford?

A. Somewhere between March 20th and March 30th.

Q. Was it before March 20th?

A. No, sir, it was between March 20th and before March 30th.

Q. Was it before March 20th that you executed the petition for habeas corpus in the Circuit Court?

A. Yes, sir, I think it was.

Q. Before the 20th?

A. Yes, sir.

Q. Then you were advised that your right to a fair trial had been infringed, between the 15th day of February and the 20th day of February?

A. Yes, sir.

Q. And where was that?

A. Palm Beach County jail.

Q. In the jail.

A. Yes, sir.

Q. Will you please describe, so that the Court may reconcile your reference to procedure, just what was done at the time that you say you pleaded not guilty before the County Solicitor in his office in Palm Beach County? Just what was done at that time? What did the County Solicitor do, and what did you do on that occasion?

A. Well, he called me in his private office and tried to get me to plead guilty to the charge.

Q. Did he read to you, a document directed to you, in which it was set forth that you had, on a certain day, within the County of Palm Beach, feloniously broken and entered, with the intent of carrying away—did he read a paper to you of that kind?

A. I don't remember whether he did or not.

Q. You don't remember?

A. No, sir.

Q. Do you recall ever pleading not guilty, or did you just refuse to plead guilty?

A. I pleaded not guilty.

Q. Well, when you say that the County Solicitor took you to his office and tried to make you plead guilty, just what do you mean by that? What did he do then?

A. He asked me to plead guilty. I plead not guilty to him. He tried to get me to change my plea to guilty.

Q. And that was the day—the first day that you were committed to the County Jail?

A. Yes, sir, the same day for that matter.

Q. The same day?

A. Yes, sir. Then I was taken on over to the county jail.

Mr. Kelly:

I have no further questions.

Re-Direct Examination.

By Mr. Baynes:

Q. You know nothing about how to try a case in a Court?

A. No, sir.

Q. You have never studied any law or anything about it?

A. No, sir.

Mr. Baynes:

That is all. Come down.

(Witness excused.)

Mr. Baynes:

We rest.

RESPONDENT'S CASE.

JUDGE EDWARD G. NEWELL, having been produced and first duly sworn as a witness on behalf of the respondent, testified as follows:

36 Direct Examination.

By Mr. Kelly:

Q. Your name, please?

A. Judge Edward G. Newell.

Q. You are judge of the Criminal Court of Record of Palm Beach County?

A. I am.

Q. Judge, you are familiar wtih the matter presented to the Court this morning?

A. With regard to the—

Q. Growing out of the prosecution and conviction, in your Court in March in 1945, of one Donald Wade. I wish you would tell the Court, please, when the term of Court at which Donald Wade was tried, opened, if you recall?

A. The term at which he was tried, opened in March. March 6th, I believe.

Q. March 6th?

A. 1945.

Q. Will you please state from your recollection, the first occasion upon which the information which had been filed by the prosecuting attorney, against Wade, was brought to your attention?

A. It was brought to my attention the 20th of February, 1945, at the time when Donald and two other alleged accomplices were arraigned.

Q. That was on February 20, 1945?

A. That's correct.

Q. Where did the arraignment take place?

A. In the Criminal Court of Record, Palm Beach County.

The Court:

In open Court, while Court was in session?

A. Open Court, while Court was in session.

By Mr. Kelly:

Q. Will you please state the next occasion upon which you recollect Wade was present in the Court Room?

A. That was on March 6th, when the case was set for trial. 1945.

Q. Then the case was set, as I understand it, for trial on March 14, 8 days thereafter?

A. That's right.

Q. On either of the two occasions, Judge, when Donald was before the Court, at the time of the arraignment and at the time of the sounding of the calendar, did he on either occasion make any request or inform the Court that he intended to make any request for the appointment of counsel to assist him?

A. No, sir, he did not.

Q. Were you informed before that time that he would not have counsel in Court at the time of his trial?

A. I was not.

Q. Did you know of the fact that effort was being made to secure counsel for him?

A. Yes. His sister, whom I have known for a good many years, came to me one time when I was eating lunch and asked me if it would do any good if she would employ counsel for Donald. And I told her the nature of the case and that the other two boys who said they were in this matter with Donald, had entered pleas—

Mr. Baynes:

Of course, what somebody else told him would be hearsay testimony as far as this defendant is concerned.

The Court:

Overruled.

A. And, as I understood it, they expected to testify against Donald. She asked me if I would name a good criminal lawyer, and I said I would not recommend a single criminal lawyer, but I would name three criminal lawyers, who, in my judgment, were capable. I named Mr. Baynes and I named Egbert C. Jackson, and I named Gordon Johnson.

Q. Did you know of any time after that occasion, that the boy had not secured the services of counsel?

A. I did not. I know that the boy's father went to see two of these gentlemen and talked with them about the case.

Q. Then, the request of the accused for the appointment of counsel at the opening of the trial, on the trial day, was the first intimation you had that he didn't have counsel or that request would be made for appointment of counsel?

A. That's right.

Q. What was your action upon his request?

A. I declined to appoint counsel for him.

Q. In your discretion?

A. In my discretion.

Q. What is the practice, Judge, in the Criminal Court of Record for Palm Beach County with regard to the appointment of counsel for those who are without counsel, when brought to trial, and make requests for the appointment?

Mr. Baynes:

If your Honor pleases, as to what is the custom, has nothing to do with what we are the rights of this petitioner in a habeas corpus proceeding. It is a question of law.

Mr. Kelly:

If the answer is immaterial, I withdraw it. It may offend against the rules of evidence, but I am trying to find out what the situation is.

The Court:

Do you want to insist on the question, or not?

Mr. Kelly:

I would like to have the Judge explain to the Court, the customary procedure in the Criminal Court of Record in Palm Beach County, Florida.

The Court:

Proceed. The objection is overruled.

A. It has been my practice that in the more serious charges, that the defendant has counsel. In the less serious offenses I have tried to find out the education of the defendant, his mentality, and if he is unable to understand the rudiments of his own defense, then I appoint counsel, but in other cases, such as this, I do not appoint counsel because, as you well know, there is no provision for the payment of any compensation to appointed counsel.

Q. Nor, any provision for the appointment of counsel except in capital cases?

A. That's correct.

Q. During the course of the trial, Judge, of Wade, on March 14th, he took the stand in his own behalf, did he not?

A. He did.

Q. What was his bearing, and in what way did he present his case to the jury?

A. He just told his story. He was on the stand very briefly, as I recall.

Q. What impression did you get with regard to his mental capacity, from his recital of the facts and circumstances as he proceeded to recite them, surrounding the matter?

A. Well, he presented his case very favorably.

Q. During the course of the trial, was he advised of the fact that he had the right to cross-examine the State's witnesses?

A. He was, and he did cross-examine the State's witnesses.

Q. He did? From your experience as a Judge, did the cross-examination of the State's witnesses exhibit any familiarity with Court procedure?

Mr. Baynes:

I think, if your Honor please, that is asking for a conclusion of the witness. If he wants to get at the facts, all right.

The Court:

Overruled.

A. I don't know that it did, Mr. Kelly.

Mr. Kelly:

Q. Did Wade address the jury?

A. He did not.

Q. Was he informed of the fact that he had a right to address the jury in his behalf?

A. Yes. Neither he nor the Country Solicitor addressed the jury.

Q. Did the State waive the—?

A. That's right.

Q. Was Wade informed he had a right to address the jury if he cared to?

A. He was.

Mr. Kelly:

You may examine.

Cross Examination.

By Mr. Baynes:

Q. He did ask you, as I understand the Court—did he at the time he asked you to appoint counsel for his defense—that was when he was called for trial?

A. Yes.

Q. And you said that you declined to appoint him counsel because of the fact that cases of this character, breaking and entering, it is not the custom to appoint them?

A. Yes. That is, unless the defendant is a wholly uneducated person.

Mr. Baynes:

That is all.

Mr. Kelly:

May I ask some further questions, if your Honor please?

The Court:

Proceed.

Re-Direct Examination.

By Mr. Kelly:

Q. Did you know this boy, Wade, and his family, prior to the time when he came on trial before you?

A. I didn't know Donald. I have known one of his sisters for quite a few years.

Q. Was he a resident of Palm Beach County at that time? Were the family resident of Palm Beach County at that time?

A. Yes, the family has lived there for a number of years.

Mr. Kelly:
That is all. Anything further?

Mr. Baynes:
You may come down.

(Witness excused.)

The Court:
Is that all the evidence?

Mr. Kelly:
The only further evidence we have, your Honor, is documentary evidence which I think, probably, has been —all facts have been admitted, by both the petitioner and the respondent, and that is—I think, in the hearing, before, the prior hearing in this same case, these facts were admitted. That is, the conviction in Jackson County and parole, and the breaking of parole and recommitment and taking the man back into custody. That would be the only other evidence that I have to offer.

The Court:
All right.

Mr. Kelly:
If that is a matter of record, and the other—

The Court:
Do you admit those facts?

Mr. Baynes:
Yes, we admit those facts.

The Court:
Do counsel wish to be heard in argument?

Mr. Baynes:

I don't believe we have the indictment or the information and the sentence of the Criminal Court of Record, in the record, that I would like to put in.

Mr. Kelly:

You may have it there.

Mr. Baynes:

Yes, sir.

Mr. Kelly:

It was admitted he was indicted and he was tried and—

The Court:

Was he indicted or informed against?

Mr. Kelly:

Informed against.

The Court:

When was the information filed?

Mr. Baynes:

We have the information here. It seems to have been filed on the 19th day of February, 1945, and he was sentenced on the 15th day of February—of March, 1945. We would like to get in the record, the information and the judgment.

The Court:

What was the date of the commitment?

Mr. Baynes:

19th day of—

The Court:
I mean, commitment after judgment.

Mr. Kelly:
We have all those documents in here, your Honor.

Mr. Baynes:
If your Honor please, if you will excuse me just a second?

The Court:
I think it is in the respondent's return. The date of the commitment.

The Clerk:
March 30th, 1945, was the date of the incarceration.

Mr. Kelly:
No, that was incarceration upon the former charge.

The Court:
The commitment, what was the date of that?

Mr. Kelly:
That was—I have a certified copy of it.

The Court:
What was the date of it? The commitment under which he was held in Raiford?

Mr. Kelly:
14th day of March, 1945.

The Court:
That could not be. He was not sentenced until the 15th day. There is something wrong somewhere.

Mr. Kelly:

From where did we get that date, your Honor? The 15th?

The Court:

Mr. Baynes just stated it out of that record, that he was sentenced on March 15, 1945. What is the date of the commitment?

Mr. Kelly:

The minutes of the sentence, are followed by an insertion "It is ordered by this Court that this Court should now recess until Thursday, March 15, 1945, at 9:30 A. M." He was sentenced the 14th.

The Court:

Was the commmitment issued that same day?

Mr. Baynes:

I don't have it.

The Court:

Let me see the return, there.

Mr. Kelly:

The 14th day of March. Here is a certified copy of it.

The Court:

March 14th.

Mr. Kelly:

No, the commitment—

The Court:

That is what I am talking about, the commitment. What date is it. Here it is in the first paragraph of, "held by virtue of commitment issued out of the Crim-

inal Court of Record of Palm Beach County, March 14, 1945". Do you wish to make any argument?

Mr. Baynes:

Upon the matter of determining when the sentence is over with, I have here, copies of letters, and letters from Mr. Mayo's office showing the date of the expiration of the sentence from Jackson County, and this sentence follows immediately.

The Court:

Well, I have this letter from Mr. Mayo.

Mr. Kelly:

I may have some comment to make, if Your Honor please, if I knew the contents of that letter.

The Court:

You can read it.

Mr. Baynes:

He sent me a time table here, from which you can figure, under a recent decision of the Supreme Court.

Mr. Kelly:

Well, that is the very point I want to call to the Court's attention.

The Court:

Here is a letter from the Commissioner, himself, and he said the sentence expired April 20th.

Mr. Baynes:

First he said March 26th, then he changed it to April 20th.

Mr. Kelly:

If the Court please, it clearly appears from the correspondence and the remarks of counsel that that date was reached by the giving advantage for gained time, which the Supreme Court of Florida has held a prisoner is not entitled to, after breaking parole. That is the case of Deer against Mayo. Of course, I understand, if your Honor please, the sentence will expire in a few days, June 4th.

The Court:

It depends on whether I am going to act now or later on. That is all. What do you want to say in argument, if anything.

Mr. Baynes:

If your Honor please, so far as the law is concerned, I think your Honor is familiar with the very position we have taken in this case. I am following the four recent cases—

The Court:

If you are looking for those habeas corpus cases, I have read them all.

Mr. Baynes:

I was going to call your Honor's attention to that and, I do not think it is necessary to argue this case. If I understand those cases, they mean this: When a man is charged with a serious offense, at the age that this boy is, and the education he has, that it is the duty of the Court to appoint counsel. I want to call the Court's attention to a recent case of the Supreme Court of Florida. A case, where it seems they have taken a little bit different view of this very question before your Honor today, in which they say that you—that a fair and im-

partial trial contemplates counsel, compulsory attendance of witnesses and time in which to prepare for trial. In other words the Supreme Court of this State has taken the position that to have a fair and impartial trial, you have to have counsel and an order of compulsory attendance of witnesses and time for trial, and, of course, a jury. A fair and impartial jury. And, if your Honor pleases, you are familiar with the law in 89 Law Edition, and it would be taking up the time of the Court to call your Honor's attention to it from the recent House case, which has been before your Honor.

Mr. Kelly:

It is not my desire to take up the Court's time, but I feel I would like to present to the Court, my view with regard to this particular question before the Court and the reliance that counsel makes upon the four Federal Court cases, the Supreme Court of the United States cases, cited in the last volume of Law Edition.

The question to be presented to the Court this morning was not involved in any one of those cases. My view of the question is this, if the Court pleases, in short: The right of an accused to be represented by counsel at his trial, is undenied. He cannot be deprived of that right. There is no procedure whereby he can be deprived of that right. Under the Federal practice, under the sixth amendment to the Federal Constitution, he is entitled to be represented by counsel, and the Courts have construed that section to mean that if he does not have, of his own choosing, counsel, it becomes the duty of the Court to appoint counsel or select counsel for him. That, however, is not a question here. The question here is, under the circumstances of this case as they have been disclosed to the Court, was the refusal of the trial judge to select counsel to assist the accused in the presentation of his case, such an act as deprived the accused of due

process of law secured to all persons under the 14th Amendment of the Constitution. It is not in every case that an accused is entitled to the appointment of counsel. That has never been a position taken by any of the Courts. It is only where the circumstances surrounding the particular case are such that the refusal of the Court to select counsel to represent the accused will amount to a deprivation of the rights of due process.

It is a delicate thing for any judge to do, to be called upon to select counsel to represent an accused who is appearing in his Court, upon a criminal charge. It is not a usual thing. It is not a general thing. And, as I take it—as I see it—whether the Courts agree with me or not, it is an unfair burden to place upon the Judge, to have him sit as a judge in a case and also select the counsel to represent the case to him for adjudication. It is foreign to our system. It is entirely foreign to our system.

The Court:

Have you read the case of Johnson versus Zerbst?

Mr. Kelly:

Yes, sir.

The Court:

It is not foreign to our system is it?

Mr. Kelly:

I may have been expressing my own view about it being foreign to our system. I said the Courts would probably not agree. However, I do stress that for the purpose of presenting to the Court that it is not every case in which an accused asks or requests appointment of counsel to assist him in his defense, that the Court is required to grant the request. It is only in such

cases as the Court feels that a refusal will deprive the accused of due process of law.

Now, in this case, as Judge Newell has explained to the Court, it is the custom in his Court to appoint counsel where the circumstances require it, and that, if the Court please, under the 14th amendment, is as far as the Court is required to go. We are not in a position where this petitioner is a Federal prisoner. He is a State prisoner and the same rule does not apply. If the Court feels that the Judge of the Criminal Court, upon that request being made for the appointment of counsel, from his knowledge of the circumstances and from his acquaintance with the defendant, in the exercise of his discretion felt that it was not a case wherein the refusal to appoint counsel would amount to a deprivation of due process of law, then he was perfectly justified in denying the request.

If the Court please, this is really not a new question. It has been called a new question before our Court, but not a new question. It is fundamental, and the reading of all of these cases, United States Supreme Court cases, including our celebrated House case, will still give the Court—will leave the Court confronted with that one governing proposition, and that is, is the Judge of the Criminal Court, duly constituted, is he to be condemned for exercising his discretion upon an extraordinary request made by an accused when, under the circumstances, he feels that the accused is not or has not been jeopardized by the refusal of the request. Thank you.

Mr. Baynes:

If your Honor please, I would like to give your Honor the decision from the Circuit Court of Appeals of the District of Columbia. It is practically on all four with this particular case.

The Court:

All right, let me have it, and the file.

All right, gentlemen, I will take the matter under advisement and let you hear from me. Meanwhile, the custody of the petitioner will remain as it now is.

. . . There being no further proceedings before the Court, the Court adjourned.

* * * * * *

55 PET. EXHIBIT 1.

Filed in Evidence 5-17-1946.

The State of Florida,
Department of Agriculture,
Prison Division.

Nathan Mayo, Commissioner.

Tallahassee,
February 28, 1946.

Mr. Eugene M. Baynes,
Attorney at Law,
604 Comeau Building,
West Palm Beach, Florida.

Re: #38067 Donald Wade, WM.

Dear Sir:

Replying to your request for expiration date of the above inmate, advise that the sentence as listed above will expire April 20, 1946. This is a two-year sentence from Jackson County on a charge of Burglary.

Wade will then take up a five-year sentence on charge of Breaking and Entering from Palm Beach County. The expiration date for this sentence cannot be figured until the sentence is actually begun.

Very truly yours,
(Sgd.) NATHAN MAYO,
(Nathan Mayo)
Commissioner.
(Sgd.) By S. L. WALTERS,
Chief Clerk.

SLW:emg

Exhibit Petitioner's #2—Motion of Appellee to Dismiss Appeal filed in Supreme Court of Florida, in case of Donald Wade vs. John Kirk, as Sheriff of Palm Beach County, Florida, (Same as Exhibit "B");

Exhibit Petitioner's #3—Order dated 5/14/45 by Supreme Court of Florida dismissing Appeal, in case of Donald Wade vs. John Kirk, as Sheriff of Palm Beach County, Florida, (Same as Exhibit "C");

Omitted from the Printed Record, being heretofore copied at pages 6 and 7.

58 FINAL JUDGMENT.

Filed May 18, 1946.

United States District Court, Southern District of Florida, Jacksonville Division.

Donald Wade, Petitioner,
vs. #845 J Civil.
Nathan Mayo, as State Prison Custodian, State of Florida, Respondent.

The Court has heard the evidence of the respective parties and the argument of their counsel. It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel. Section 11 of the Declaration of Rights of the Florida Constitution provides that "in *all* criminal prosecutions, the accused * * * shall be heard by himself, or counsel, or both, * * *." The denial of petitioner's request in the circumstances here involved constitutes a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held. See Deeb vs. State, 179 Sou. 894; Christie vs. State, 114 Sou. 450; House vs. Mayo, 63 Fed. Supp. 169. And the Court further finding that earlier commitments, under which peti-

tioner has been heretofore held, expired on April 20, 1946, and the the commitment under which petitioner is now held, issuing out of the Criminal Court of Record of Palm Beach County, Florida on March 14, 1945 based upon a judgment of said Court of the same date, is void and of no effect for the reasons hereinabove stated, it is upon consideration thereof—

Ordered And Adjudged:

1. Said petitioner Donald Wade be and he is hereby released and discharged from the custody of the respondent Nathan Mayo, as State Prison Custodian, under commitment issuing out of the Criminal Court of Record of Palm Beach County, Florida, dated March 14, 1945, The petitioner, however, is remanded to the custody of the Sheriff of Palm Beach County, Florida, to be by him held for such further proceedings as may be taken by the State of Florida against said petitioner under and by virtue of the information charging breaking and entering with intent to commit a felony, filed in the Criminal Court of Record of Palm Beach County, Florida on February 19, 1945, and the respondent Nathan Mayo is authorized and directed to deliver the body of the said petitioner Donald Wade to the Sheriff of Palm Beach County, Florida, for the purpose last stated.

2. A copy of this judgment shall be served upon the respondent by the United States Marshal for the Northern District of Florida, at the cost of the United States.

Done And Ordered at Jacksonville, Florida, May 18, 1946.

(Sgd.) LOUIE W. STRUM,
(Louie W. Strum)
U. S. District Judge.

(Recorded in Jacksonville Civil Order Book 9, page 786.)

Copies—
Eugene W. Baynes, Comeau Bldg., West Palm Beach,
Hon. J. Tom Watson, Attorney General, Tallahassee,
Hon. Nathan Mayo, as State Prison Custodian, Tallahassee.

59 MARSHAL'S RETURN.

Received this Final Judgment at Tallahassee, Florida, on May 24, 1946, and executed same by serving Nathan Mayo, as State Prison Custodian, with a true copy of said judgment, exhibiting the original, and making the contents known to him.

(Sgd.) J. B. ROYALL,
(J. B. Royall)
United States Marshal.

(Marshal's Return)—Filed Jun. 7, 1946, Jacksonville, Fla. Edwin R. Williams, Clerk.

PETITION FOR CERTIFICATE OF PROBABLE CAUSE.

60 Filed May 28, 1946.

(Title Omitted.)

To the Honorable Louie W. Strum, Judge of said Court:

Now comes the respondent, Nathan Mayo, as State Prison Custodian, State of Florida, by his undersigned

attorneys, J. Tom Watson, Attorney General of the State of Florida, Reeves Bowen, Assistant Attorney General of the State of Florida, and Sumter Leitner, Assistant Attorney General of the State of Florida, and shows here unto your Honor that he desires to appeal to the Circuit Court of Appeals of the Fifth Circuit from that final judgment entered by your Honor on the 18th day of May, 1946, in the above entitled cause, and he asks that your Honor wil enter an order holding that in your opinion there exists probable cause for such appeal.

As grounds for the said asking, your petitioner sets forth the following:

1. The laws of the State of Florida require the appointment of counsel for defendant only in capital cases and when the defendant is insolvent and in no other case.

2. The matter of appointing counsel to represent the defendant is within the discretion of the trial Court and is not compulsory under the laws of the State of Florida save in capital cases where the defendant is insolvent.

3. If it is the duty of the trial Court of the State of Florida in all cases where the defendant is insolvent to appoint counsel to represent the defendant, upon request of defendant, then your petitioner would seek to have this matter decided by a Court of last resort.

4. The question involved in this case, that is, whether or not it is the duty of the trial Court in the State of Florida to appoint counsel to represent indigent defendants in all cases, whether capital or not, upon the request of such defendant, is of such vital importance to the criminal procedure of the State of Florida that this

petitioner feels an appeal should be allowed and that there is probable cause for such an appeal.

Wherefore, your petitioner requests your Honor to enter an order for probable cause as required by Title 28, Section 466, U. S. C. A.

J. TOM WATSON,
(J. Tom Watson)
Attorney General.
REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.
Attorneys for resopndent.

ORDER GRANTING CERTIFICATE OF PROBABLE CAUSE.

63 Filed May 28, 1946.

(Title Omitted.)

This cause coming on this day to be heard upon the petition of the respondent, Nathan Mayo, as State Prison Custodian, State of Florida, for an order of this Court holding that there exists probable cause for an appeal to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this cause on the 18th day of May, 1946, and the Court being of the opinion that there exists probable cause for such an appeal, I, Louie W. Strum, Judge of the above styled Court, do hereby certify that in my opinion there exists probable

cause for such an appeal and hereby grant such certificate of probable cause.

Done And Ordered at Jacksonville, Florida, this 28 day of May, 1946.

LOUIE W. STRUM,
District Judge.

(Recorded Jacksonville Civil Order Book 9, page 803.)

PETITION FOR ALLOWANCE OF APPEAL.

65 Filed May 28, 1946.

(Title Omitted.)

To the Honorable Louie W. Strum, District Judge:

Your petitioner, Nathan Mayo, as State Prison Custodian, State of Florida, respondent in the above entitled cause, deeming himself aggrieved by the order and judgment entered herein on the 18th day of May, 1946, now seeks redress on appeal to the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana, that they may review the matters and things set forth in the transcript and record of proceedings upon which said order and judgment was made, and prays that the said appeal may be allowed and that a transcript and record of the proceedings upon which said order and judgment were made, duly authenticated, may be

sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit of the United States.

J. TOM WATSON,
(J. Tom Watson)
Attorney General.
REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.
Attorneys for respondent.

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67 ORDER.

Filed May 28, 1946.

(Title Omitted.)

It is considered and ordered that petitioner's motion asking for the allowance of an appeal from the final judgment of the Court, dated May 18, 1946, be and the same is hereby granted.

Done And Ordered at Jacksonville, Florida, this the 28 day of May, 1946.

LOUIE W. STRUM,
District Judge.

(Recorded Jacksonville Civil Order Book 9, page 804.)

68 NOTICE OF APPEAL.

Filed May 28, 1946.

In the United States District Court, Southern District of Florida, Jacksonville Division.

Donald Wade, Petitioner,

vs. No. 845 J-Civ.

Nathan Mayo, as State Prison Custodian, State of Florida, Respondent.

Now comes Nathan Mayo, as State Prison Custodian, State of Florida, respondent,, appellant, by his undersigned attorneys, deeming himself aggrieved by the order and judgment entered herein on the 18th day of May, 1946, does hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the said order and judgment of the said United States District Court for said District, made, given and entered in said Court, wherein on petition for writ of habeas corpus praying for the release of Donald Wade from the custody of the respondent, the petitioner, appellee was sustained and remanded to the custody of the sheriff of Palm Beach County, Florida.

Dated this the 28th day of May, 1946.

J. TOM WATSON,
(J. Tom Watson)
Attorney General.
REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.

70 SUPPLEMENTAL MEMORANDUM.

Filed May 29, 1946.

(Title Omitted.)

In connection with, and as a part of, the Court's judgment of May 18, 1946, the following supplemental conclusions of law are made:

In construing Section 11 of the Declaration of Rights of the Florida Constitution, the Supreme Court of Florida has said:

"These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the law; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the State. The *absolute command* of the Constitution that, 'in all criminal prosecutions, the accused * * * shall be heard by himself, or counsel or both,' is more than a right secured to the accused. It is a *mandatory organic* rule of procedure in *all criminal* prosecutions in *all* Courts of this State." (Italics supplied.) Deeb v. State, 179 Sou. 894.

In Wood v. State, 19 Sou, (2) 872, the Supreme Court of Florida further said:

"We are committed to the doctrine that regardless of the heinousness of the crime one may be charged with, he is entitled to a fair and impartial trial by a jury of his peers. The trial contemplates counsel, compulsory attendance of witnesses * * * and steps short of these several requirements defeat the spirit of the law."

As the Supreme Court of Florida has thus construed the provisions of Section 11 of the Declaration of Rights of the State Constitution of Florida as creating a *mandatory organic* rule of procedure, essential to a fair trial, in *all criminal* prosecutions in *all* Courts of the State, the decision in Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595, does not apply here.

Done And Ordered at Jacksonville, Florida, May 29, 1946.

(Sgd.) LOUIE W. STRUM,
(Louie W. Strum)
U. S. District Judge.

Copies—
Eugene M. Baynes, Comeau Bldg., West Palm Beach,
Hon. J. Tom Watson, Attorney General, Tallahassee, Fla.,
Attention: Hon. Reeves Bowen, Asst. Attorney General.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

72 Filed Jun. 14, 1946.

(Title Omitted.)

To the Honorable Edwin R. Williams, Clerk of said Court:

The respondent having taken an appeal to the United States Court of Appeals, Fifth Circuit at New Orleans, from the order and judgment entered in this cause and Court on the 18th day of May, 1946, now directs that

you make up the transcript of record in said cause and to include therein the following:

The complete record and all the proceedings and evidence in the said cause, including:

1. Petition for writ of habeas corpus;

2. Application of Donald Wade for leave to sue as a poor person;

3. Order granting petitioner's motion for leave to proceed in forma pauperis;

4. Return of respondent;

5. Motion to quash writ of habeas corpus;

6. The reporter's transcript of the evidence and proceedings had in said cause, including all exhibits and papers filed at said hearing;

7. Final judgment;

8. Petition for certificate of probable cause;

9. Order granting certificate of probable cause;

10. Petition for allowance of appeal;

11. Order allowing appeal;

12. Notice of appeal with date of filing;

13. The Court's supplemental memorandum;

14. Designation of contents of record on appeal.

Please show the recordation of such of the foregoing as are required to be recorded, and show the date of filing of the others.

(Sgd.) J. TOM WATSON,
(J. Tom Watson)
Attorney General.
(Sgd.) REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
(Sgd.) SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.
Attorneys for respondent-appellee.

State of Florida,
County of Leon.

On this day personally appeared before me, a Notary Public, in and for the State of Florida at Large, Reeves Bowen, Assistant Attorney General, who being first duly sworn, on oath says that he did on this, the 13th day of June, 1946, serve a copy of the above and foregoing designation of contents of record on appeal on the petitioner, Donald Wade, and a copy thereof on the petitioner's attorney, Hon. E. M. Baynes, by mailing one of said copies in a sealed envelope addressed to Mr. Donald Wade, in care of Honorable J. F. Kirk, Sheriff of Palm Beach County, West Palm Beach, Florida, and by mailing the other of said copies in a sealed envelope addressed to Honorable E. M. Baynes, Attorney at Law, 604 Comeau Building, West Palm Beach, Florida, with each of said envelopes bearing sufficient United States

postage stamps to insure delivery at its said destination, and the same being this day deposited by me in the United States mails at Tallahassee, Florida.

(Sgd.) REEVES BOWEN.

Sworn to and subscribed before me this 13th day of June, 1946.

(Sgd.) MARY L. VALLANCE,
Notary Public, State of Florida at Large.

(Notary Seal)

My commission expires March 14, 1950. Bonded by American Surety Co. of N. Y.

United States of America,
Southern District of Florida, ss.

I, EDWIN R. WILLIAMS, Clerk of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered 1 to 73, inclusive, contain a true copy of all such papers and proceedings in the cause of Donald Wade, Petitioner, vs. Nathan Mayo, as State Prison Custodian, State of Florida, Respondent, as appear upon the records and files of my office that have been directed to be included in said transcript by the agreement of the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Jacksonville, Florida, on this the 24th day of June, A. D. 1946.

(Seal)

EDWIN R. WILLIAMS,
Clerk, U. S. District Court,
Southern District of Florida.
By L. GIBSON HOUSE,
Deputy Clerk.

[fol. 67] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

No. 11715

NATHAN MAYO, as State Prison Custodian, State of Florida

versus

DONALD WADE

ARGUMENT AND SUBMISSION—October 23, 1946

On this day this cause was called, and after argument by Sumter Leitner, Esq., Assistant Attorney General of Florida, for appellant, was submitted to the Court.

[fol. 68] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11715

NATHAN MAYO, as State Prison Custodian, State of Florida,
Appellant,

versus

DONALD WADE, Appellee

Appeal from the District Court of the United States for the Southern District of Florida

(November 22, 1946)

Before Sibley, Hutcheson, and Waller, Circuit Judges

OPINION OF THE COURT—Filed November 22, 1946

WALLER, Circuit Judge:

Appellee was convicted in Palm Beach County, Florida, March 14, 1945, in the Criminal Court of Record, for the offense of breaking and entering, which was not a capital offense. On the next day he filed a petition in habeas corpus in the Circuit Court of the State of Florida having jurisdiction in Palm Beach County, alleging that he had been

unable to employ counsel, and that the Criminal Court of Record denied his request for the Court to appoint counsel [fol. 69] to represent him in his trial. The Circuit Court quashed the writ and remanded the Appellee to the custody of the Sheriff of Palm Beach County.

His appeal to the Supreme Court of Florida was, on motion of the Attorney General of the State of Florida, dismissed as frivolous. Having exhausted all available remedies in the state courts, Appellee, on May 10, 1946, filed a petition, with substantially the same allegations, for a writ of habeas corpus in the District Court of the United States for the Southern District of Florida, Jacksonville Division. He was allowed to proceed in forma pauperis and in due course a return to the writ was filed by Respondent. Testimony was taken and upon final hearing the Court below made the following finding:

> "It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel."

The Appellee had, in November, 1943, pleaded guilty in Jackson County, Florida, to a charge of burglary, and had served a portion of his sentence, from which he was on parole at the time of the alleged breaking and entering in Palm Beach County. He had completed the eighth grade [fol. 70] in school. During the progress of the trial in the second case it appeared that Appellee: (a) was advised by the trial Judge of his right to challenge jurors and excuse as many as six without any reason being given therefor; (b) was afforded an opportunity, which he accepted, to cross examine state witnesses; (c) took the stand and testified fully in his own behalf; (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney.

There were no complicated questions of law involved in the trial but only simple questions of fact.

Two others who were charged with the offense jointly with Wade pleaded guilty.

The Court below, after hearing the evidence, was of the opinion, and so held, that under Section 11 of the Declaration of Rights of the Florida Constitution[1] and certain Florida decisions[2] the refusal of the trial Court to appoint an attorney to defend Petitioner was a denial of due process under the laws of Florida, contrary to the Fourteenth Amendment to the Federal Constitution.

In undertaking to determine what the Florida law on the subject is we note that Sec. 909.21, Florida Statutes, 1941,[3] requires the appointment by the court of counsel to defend indigent persons only in capital cases. This statute makes it mandatory for the court to appoint attorneys for indigent persons in capital cases and to pay [fol. 71] them out of the public treasury, but there is no requirement that counsel be appointed to represent a defendant in a non-capital case, and there is no authority to pay counsel for defending such a case in the event the court, in the exercise of its discretion, did appoint one.

In *Watson v. State*, 194 So. 640, 142 Fla. 218, decided March 8, 1940, the Supreme Court of Florida said:

> "While it is true that the help or assistance of able and resourceful counsel during the progress of trial cannot be questioned, this Court is without power to reverse a case because the defendants in a criminal case were not represented by counsel and for that reason failed to obtain a fair trial. The Legislature

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[1] "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, * * *." Sec. 11, Declaration of Rights, Fla. Constitution.

[2] Deeb v. State, 179 So. 894; Christie v. State, 114 So. 450.

[3] "In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed." Sec. 909.21, Florida Statutes, 1941.

of Florida, by the enactment of Section 8375, C. G. L.,[4] restricts the power of the courts to appoint counsel for indigent defendants at public expense to capital cases. The case at bar is not a capital case and therefore no duty rested on the lower court to supply counsel for plaintiffs in error at public expense."

In *Johnson v. State*, 4 So. 2d 671, 148 Fla. 510, decided November 21, 1941, the Court said:

"There was no duty resting upon the trial court to appoint counsel to represent the accused as he was not charged with a capital offense. See Sec. 157, Criminal Procedure, Acts 1939, c. 19554; *Watson et al. v. State*, 142 Fla. 218, 194 So. 640."

It is not necessary, however, for us to review other cases for it seems that the Supreme Court of Florida has decided the very case before us. Attention was called [fol. 72] heretofore to the fact that the Florida Supreme Court had sustained the Attorney General's motion to dismiss Wade's appeal as frivolous. No opinion was written in that case, but on October 6, 1946 [since the rendition of the opinion by the lower Court in the present case], in the case of *John R. Johnson, Petitioner, v. Nathan Mayo, as State Prison Custodian* [not yet officially reported], that Court had before it the petition of Johnson for a writ of habeas corpus, alleging that he was brought to trial in Madison County, Florida, for the larceny of an automobile, a non-capital felony, and forced to go to trial without counsel, notwithstanding the fact that he had stated to the Court that he was without funds with which to employ counsel and had requested that the Court appoint counsel for his defense. His contention before the Supreme Court was that the trial Court, by refusing to appoint counsel to defend him, violated Sec. 11 of the Declaration of Rights of the Constitution of Florida and the Fourteenth Amendment to the Federal Constitution, by reason of which his conviction, judgment, and sentence were void. The sole question presented to the Supreme Court of Florida was whether or not under the Constitution and statutes of Florida the Judge of the trial Court was required to appoint

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[4] Same as Sec. 909.21, Florida Statutes, 1941.

counsel to defend an indigent defendant in a non-capital case. The Supreme Court said:

"The only statute which we have in this State touching upon the question here under consideration is Section 909.21 Fla. Statutes 1941 (Same F. S. A.), which provides for the appointment by the trial Judge of counsel for an insolvent defendant who is charged with a capital offense. This section of the statute limits requirement that counsel be appointed by the [fol. 73] court for indigent defendants to those defendants who are charged with the commission of a capital offense. Our construction of Sec. 11 of our Declaration of Rights is that any defendant charged with a felony in the courts of this state shall have the right to be heard in his own defense in his own proper person and also by counsel, if he has counsel, and presents himself and his counsel at the bar of the court where he is to be heard. But this constitutional provision does not require that he should provide himself with counsel, nor does it require that the State should furnish him with counsel to be selected and appointed by the trial court.

"We have repeatedly held that in cases where the charge was less than a capital offense no duty rested upon the trial court to supply counsel for the defendant. See *Cutts v. State,* 54 Fla. 21, 45 Sou. 491; *Watson et al. v. State,* 142 Fla. 218, 194 Sou. 640; *Johnson v. State,* 148 Fla. 510, 4 Sou. (2) 671.

"In May, 1945, Donald Wade presented his appeal to this Court from a judgment quashing a writ of habeas corpus theretofore issued by the Circuit Court of Palm Beach County on the petition of Donald Wade alleging that he had been unlawfully convicted of the commission of a felony in Palm Beach County in that 'at the time of his trial, conviction and sentence he was without aid of counsel and the court did not make an appointment of counsel, nor did petitioner waive his constitutional rights to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to go to trial without the aid of counsel.' It was also alleged that he was ignorant and was also, because of lack of funds, unable to employ counsel; and that he requested the

court to appoint counsel for him. He further alleged that he was not guilty of the offense charged:

[fol. 74] "Motion was made to dismiss the petition on the ground that the appeal was frivolous and on May 14th, 1945 we entered an order granting the motion to dismiss on the ground stated.

"We recognize the fact that in a great number of cases in other jurisdictions courts have construed provisions of respective State Constitutions similar to ours to guarantee to a defendant charged with a felony the benefit of counsel.

"We are also cognizant of the rule in the Federal Courts but we are of the view that those decisions do not control in Florida."

That opinion, giving the reasons for dismissing the petition of Wade wherein was raised the same ground as he has raised here, we think is decisive.

We, of course, are aware of the rule in federal courts which requires the appointment of counsel to represent indigent persons charged with any felony, but that rule is based upon an interpretation of the Sixth Amendment to the Federal Constitution which is applicable only in the federal courts.

We are also cognizant of the decisions of the United States Supreme Court such as *Williams v. Kaiser*, 323 U. S. 471; *Rice v. Olson*, 324 U. S. 786; *Henry Hawk v. Olson*, 324 U. S. 839, and *White v. Ragen*, 324 U. S. 760, which at first blush would create the impression that the case of *Betts v. Brady*, 316 U. S. 455, has been overruled. A careful analysis, however, of those later cases[5] convinces

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[5] Williams v. Kaiser, 323 U. S. 471, was a case from Missouri where the state statute required the appointment of counsel to defend an indigent person charged with robbery, a first degree felony.

In Rice v. Olson, 324 U. S. 786, Petitioner was an Indian who committed the crime of burglary on an Indian reservation over which the United States Court had exclusive jurisdiction. It arose in Nebraska, which has a statute [R. S. 1943, Crim. Proc. Art. 18, § 29-1803] which reads in part as folllows:

"Counsel for accused, assignment by court, counsel fees allowance—When any person shall be indicted for

[fol. 75] us that the Court has neither overruled nor modified its opinion in *Betts v. Brady*, supra.

We have been cited to no case decided by the Supreme Court of the United States holding that the failure to appoint counsel to represent a defendant in a non-capital case in a state court is a denial of due process under the Fourteenth Amendment unless the law of the state requires such an appointment.

The judgment of the Court below is reversed and remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and Remanded.

[fol. 76] In United States Circuit Court of Appeals

No. 11715

Nathan Mayo, as State Prison Custodian, State of Florida,

versus

Donald Wade

Judgment—November 22, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

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an offense which is capital or punishable by imprisonment in the penitentiary, the court is hereby authorized and required to assign to such person counsel, not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours."

In Henry Hawk v. Olson, 324 U. S. 839, Petitioner was charged with murder in the first degree. This case also arose in Nebraska and was governed by the statute in the preceding paragraph.

White v. Ragen was a case arising in Illinois where the state statutes require the court to appoint counsel in all criminal cases where the defendants are unable to procure counsel. [See footnote 28, Betts v. Brady, 316 U. S. 455 (text, 470), citing Ill. R. S. 1935, c. 38, paragraph 730.]

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Donald Wade, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 40

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 9, 1947

On Consideration of the motion for leave to proceed *in forma pauperis* in this case.

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 79] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 40

ORDER ALLOWING CERTIORARI—Filed June 9, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 40

Petition not printed

DONALD WADE,

Petitioner,

vs.

NATHAN MAYO, AS STATE PRISON CUSTODIAN OF THE STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER

E. M. BAYNES,
Counsel for Petitioner,
604 Comeau Bldg.,
West Palm Beach, Florida.

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No. 40

DONALD WADE,

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vs.

NATHAN MAYO, AS STATE PRISON CUSTODIAN OF THE STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

I

Opinions of the Courts Below

1. Order of the Circuit Court of the 15th Judicial Circuit of Florida in and for Palm Beach County quashing writ. (R. 5-6.)

2. Order of the Supreme Court of Florida dismissing the appeal of the Circuit Court of Palm Beach County, Florida. (R. 7-8.)

3. Final judgment of the Disfrict Court of the United States sustaining the petition of Donald Wade. (R. 53 and 61.)

4. Opinion of the U. S. Circuit Court of Appeals for the 5th Circuit reversing the order of the District Court for the Southern District of Florida. *Mayo* v. *Wade*, 158 Fed. (2nd) 614. (R. 67-74.)

II

Grounds of Jurisdiction

1. We believe that U. S. C. A. 28, Section 347 (a) sustains the jurisdiction of the Supreme Court of the United States in this cause.

2. The date of the judgment of the United States Circuit Court of Appeals for the 5th Circuit to be reviewed is November 22, 1946. This date is shown in the printed judgment mailed by the Clerk of the Circuit Court of Appeals of the 5th Circuit attached to the original petition for writ of certiorari. (R. 67-74.)

III

Concise Statement of the Case

1. Donald Wade was arrested for the offense of breaking and entering under the laws of the State of Florida on the 19th day of February, 1945, and placed in the county jail of Palm Beach County, Florida. On the 14th day of March, 1945, the appellant was tried and convicted and sentenced for breaking and entering. He was in the county jail from the time of his arrest on the 19th of February, until the following 14th of March. At that time he was called from the jail and brought to the court for trial. He informed the court that he was unable to employ counsel and requested the court to appoint counsel to represent him in

his trial. He was 18 years of age and had finished the 8th grade of school, but, of course, knew nothing of the practice in the courts.

2. In order to bring the constitutional question before the state courts, your petitioner filed in the Circuit Court of Palm Beach County, Florida, a writ of habeas corpus, asking discharge upon the grounds that he had not received a fair trial by reason of his poverty and inability to employ counsel in the trial, and such denied him his constitutional rights under the constitution of the State of Florida and of the United States. This motion was quashed in the Circuit Court and appealed to the Supreme Court of Florida. (R. 5-6.) On the 14th day of May, 1945, this appeal was dismissed by the Supreme Court of Florida. (R. 7-8.)

3. On the 8th day of May, 1946, a petition was filed in the District Court for the Southern District of Florida, Jacksonville Division, for writ of habeas corpus and the writ was allowed. The matter came on for hearing before the District Judge at Jacksonville, Florida, on the 17th day of May, 1946. The District Judge, after hearing the evidence in the cause, rendered his final judgment discharging your petitioner from the custody of the State Prison Custodian and remanding him to the Sheriff of the Criminal Court of Record, Palm Beach County, Florida, for such further proceedings as may be taken against said petitioner by the State of Florida under the information, and held that a denial of the petitioner's request under the circumstances involved in this cause, was a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held. (R. 53 and 61.)

4. Thereafter, the Honorable Nathan Mayo, State Prison Custodian, appealed from the District Court of the United States for the Southern District of Florida to the United

States Circuit Court of Appeals. The matter came on for hearing before the Circuit Court of Appeals of the Fifth Circuit and they reversed the decision of the District Court, for the reason that there had not been cited any case decided by the Supreme Court of the United States holding that the failure to appoint counsel to represent a defendant in a non-capital case in a state court is a denial of due process under the 14th Amendment, unless the law of the state requires such an appointment. (R. 67-74.) (158 So. (2nd) 614.)

IV

Specification of Errors

1. That the U. S. Circuit Court of Appeals of the 5th Circuit erred in finding and holding that a denial of counsel for the defendant by the state court was not a denial of due process under the 14th Amendment, unless the laws of the state require such an appointment.

2. That the U. S. Circuit Court of Appeals of the 5th Circuit erred in finding and holding that the District Court decision should be reversed.

3. That the U. S. Circuit Court of Appeals of the 5th Circuit erred in finding and holding that under the facts presented in this cause was not a violation of the due process of our laws, both State and Federal.

V

Argument

This case can be boiled down for the sake of brevity to one question. Where a boy 18 years of age, with only an 8th grade education, is arrested on February 19th and placed in jail and kept there until March 14th, and brought into court for trial without the benefit of counsel, although

counsel was requested, did he receive a fair and impartial trial under the due process guaranty of our Federal Constitution and the Constitution of the State of Florida?

I believe that it can be said without much fear of successful contradiction that where any man is charged with a crime and put in jail and kept there and brought into court and rushed right into a trial, without the benefit of counsel, that he certainly does not get a fair trial. I believe that this would apply to even a learned lawyer, who is not on the outside where he could investigate the charge against him; where he could not have the benefit of a law library in order to prepare his defense; where he could not do all the things necessary for a fair and impartial trial, it would certainly be embarrassing, even to him, where he was unable by reason of his poverty, to have this work done. Surely, it must be recognized that this condition would not give a young man a fair trial, who, on account of his poverty, was unable to have some one skilled in the practice of law look after his interest and to prepare a defense. It goes without saying, that such a condition could not meet the requirements of our constitution of a fair and impartial trial under the due process clause of the constitution.

It seems to be the trend of the courts to hold that where the legislature has provided for the appointment and pay of counsel in capital cases only, that it follows that by reason of this legislative enactment, that it is the law of this State that the court is not bound to appoint an attorney to represent a young man, who is poverty stricken and unable to employ counsel for a fair trial. But I do not think that is the practice or the law of this State. As was said in the case of *Cutts* v. *State*, 54 Fla. 21, 45 Sou. 491, the Supreme Court of Florida announced this law: "Where a party charged with a felony has been arraigned and is asked whether he has counsel to represent him and it appears that

he has no attorney and is unable to employ one, if he signifies his desire to be represented by one, it is the practice of the trial judge to appoint an attorney." The court further said in the same case that "It is the duty of counsel designated by the court to give his professional assistance to an accused person who is unable to employ counsel." In this same case, the court further says: "If the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is not grounds for a reversal, unless it further appears that the right to have counsel was denied."

This *Cutts v. State, supra,* is followed by *Weatherford* v. *State,* 79 Fla. 680, 681, 94 Sou. 507.

The case of *Cutts* v. *State* was cited approvingly by the Supreme Court of the United States in the case of *Powell* v. *Alabama,* 287 U. S. 70, 77 Law Ed. 171. This case was cited approvingly in consideration of the enunciation by the court of the fact that among the elements necessary to due process of law at a trial is to have the advice and assistance of counsel.

In citing this case in *Bettz* v. *Brady,* 186 Sou. 445, 86 Law Ed. 1605, the Supreme Court says: "In six (states) the provision (one of which is like the 6th Amendment) have been held not to require the appointment of counsel for indigent defendants." We believe that the court was in error in making that broad statement, from the fact that it is the practice of the State of Florida in her courts to appoint counsel for indigent defendants, as the courts fully recognize that they cannot obtain a fair trial without the aid of counsel. It is true that we have a law which required the appointment of counsel in capital cases and to be paid by the State. Yet, I do not believe that by the fact of having that law, that it changes our practice one bit. It should not. A fair trial is guaranteed and you

cannot have a fair trial without the aid of counsel. We believe that the correct position of Florida is set out in the *Betts* v. *Brady* case on page 479 of the U. S. Reports and page 1610 of the Law Ed., when Florida is placed in the category of requiring counsel by established practice judiciously approved.

The constitutional provision in the State of Florida provides as follows:

"Sec. II. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

In the construction of this constitutional provision, our Supreme Court has said as follows:

"Fundamental rights of a person charged with an offense, including the right of representation by counsel, must be respected and observed by officers when enforcing criminal laws. Walker *v.* State, 150 Fla. 476, 8 So. (2nd) 22."

"Requirement of this section that accused be heard by himself or counsel or both is more than right secured to accused, and is mandatory organic rule of procedure in all criminal prosecutions. Deeb *v.* State, 131 Fla. 632, 179 So. 894. In this case the court said: "The provisions of the Constitution that in all criminal prosecutions the accused shall have stated particular rights include an express specific command that the accused 'shall be heard by himself, or counsel, or both.'" These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the laws; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the State."

"Requirement by this section that accused be heard by himself or counsel or both cannot be evaded, and full benefit thereof should not be denied by too strict an application of judicial or statutory rules of evidence or of procedure. Deeb *v.* State, 131 Fla. 362, 179 So. 894."

"Constitutional guaranty of fair and impartial trial contemplates benefit of counsel and ample opportunity to prepare for trial. Lowe *v.* State, 95 Fla. 81, 116 So. 240."

In the case of *Cristie* v. *State*, 94 Fla. 469, 114 So. 450, our Supreme Court said as follows:

"(2) Our country is committed to the doctrine that no matter what the crime one may be charged with, he is entitled to a fair and impartial trial by a jury of his peers. Such a trial contemplates counsel to look after his defense, compulsory attendance of witnesses, if need be, and a reasonable time in the light of all the prevailing circumstances to investigate, properly prepare and present his defense. When less than this is given, the spirit and purpose of the law is defeated. Moore *v.* State, 59 Fla. 23, 52 So. 971; State *v.* Pool, 50 La. Ann. 449, 23 So. 503; Browne *v.* State, 88 Fla. 457, 102 So. 546, Anderson *v.* State (Fla.) 110 So. 250."

In the case of *Bettz* v. *Brady*, 316 U. S. 455, 86 Law. Ed. 1595, the Supreme Court of the United States said: "In the light of this evidence, we are unable to say that the concept of due process incorporated in the 14th Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case." The court points out in this case, that it was tried before the judge without a jury; the man was 43 years old, of ordinary intelligence and ability to take care of his own interest at the trial of that narrow issue. It is quite clear that in Maryland, if the situation had been otherwise and it appeared that the petitioner was, for any reason, at a serious disadvantage by the reason of the lack of counsel, a refusal to appoint

would have resulted in the reversal of a judgment of conviction. Only recently, the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused tried without counsel had been handicapped by the lack of representation.

In the case at bar, instead of the man being 43 years old, he was 18. He had only an 8th grade education. The District Judge, before whom the testimony was taken, saw him and had a chance to weigh his intelligence and ability to take care of his interests in a trial of the case. The issue in the case at bar was entirely different from the narrow issue in the *Bettz* case. The only issue there presented was an alibi. Here the issue was a broad one of not guilty, denying each of the material allegations of the information.

The Supreme Court said in their decision in *Bettz* v. *Brady, supra,* "that the 14th Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and the fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for an offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." We are not asking the Court in this case to determine such a broad issue and to hold that in every case that if you do not furnish an indigent defendant with counsel upon his request, that such is denial of due process of law. We are only asking that, under the facts of this cause, that the Court hold that in this case, it was a denial of due process as the District Judge held in his decision.

We wish to call the Court's attention to the fact that the District Judge was formerly a Justice of the Supreme Court of Florida, before his appointment as United States District

Judge of the Southern District of Florida. He is, therefore, by reason of his long experience, very qualified to pass upon questions of this character. He saw the petitioner when he was brought before him in the habeas corpus case. He had a chance to weigh in his judicial mind the facts and circumstances which he saw and heard. The Supreme Court of the United States recognized that there are certain circumstances where the denial of counsel to an indigent defendant would be a denial of the due process clause of the Constitution of the United States. That was what the District Court decided in this case. Again, the Bill of Rights of the State of Maryland, under which the *Bettz* v. *Brady* case, *supra*, arose, does not read the same as the Bill of Rights under the Florida Constitution and the Constitution of the United States. The Maryland Constitution says that the defendant "should be allowed counsel." The Constitution of the State of Florida says "that the accused shall have the right to be heard by himself or counsel or both." The Constitution of the United States says "that the accused shall enjoy the right to have the assistance of counsel for his defense." In the latter case of the Constitution of the United States, the Supreme Court has held that the right to counsel is mandatory. It is almost the same identical language of the Constitution of Florida.

I do not get the logic of the reasoning that where the State has provided only for the appointment of counsel in the capital cases, that the legislature did not intend that they should have the right to counsel in all felony cases just for the reason that they passed a law requiring counsel in capital cases with pay. I believe that it was the intention of the legislature in this particular law, to provide compensation for attorneys appointed in capital cases, rather than to limit the right of appointments to only capital cases and not other serious felonies. This case carries a maxi-

mum of 20 years. In a capital case for murder, the defendant could be found guilty of a crime of a lesser degree, with a maximum less than 20 years. My idea is that it was made for the purpose of providing compensation in capital cases, rather than limiting the right to counsel, as guaranteed him under the Bill of Rights and under the due process clause of the Constitution of the United States.

In the case of *Williams* v. *State (Fla.)* 197 Sou. 562, the Supreme Court held: "Section 8375, C.G.L., authorizes the trial court to make the appointment of counsel for the defendant. High authority, independent of statute, holds that a trial court has the inherent right in the administration of justice, to appoint an attorney to represent an indigent defendant charged with a felony. See 14 Am. Jr. Par. 174. The attorney being an officer of the court, and when by the court appointed to represent, professionally, an indigent person charged with a felony, it then becomes his duty to render faithful and efficient professional services so that the courts may so function that the legal rights of an indigent defendant may be determined and justice administered according to law. These obligations rest on an attorney as an officer of the court, regardless of the enemies or the friends made by counsel while discharging his professional duties in the trial of a case before the courts."

In the case of *Deeb* v. *State (Fla.)*, 179 So. 894-895, the Supreme Court held: "The provisions of the Constitution that in all criminal prosecutions the accused shall have stated particular rights include an express specific command that the accused 'shall be heard by himself, or counsel or both.' These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the laws; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the State. The absolute command of

the Constitution that 'in all criminal prosecutions, the accused * * * shall be heard by himself, or counsel, or both,' is more than right secured to an accused. It is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State."

In the case of *Williams* v. *Kaiser*, 323 U. S. 471, 89 L. Ed. 398, the Supreme Court of the United States held:

> "These considerations underscore what was said in Powell *v.* Alabama, Supra (287 U. S. 69, 77 L. Ed. 170, 53 S. Ct. 55, 84 A. L. R. 527): 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect'."

The fact that the legislature of Florida saw fit in capital cases to direct the appointment of counsel and for his pay, only emphasizes what the Supreme Court of the United States has said with reference to the necessity of counsel in felony cases. But the due process clause of the 14th Amendment does not even refer to life. It says liberty or property in which you are to have due process, which includes life. Just because a capital case might mean a death sentence, does not in anywise or in any manner take away

from us the guaranty of liberty by due process of law. It seems to follow that if the legislature recognized that counsel was necessary in capital cases, that it was certainly necessary in serious felony cases where liberty of the person is involved. When they did not go any further and make a provision for payment of those attorneys appointed in all felony cases, certainly does not argue that the right to counsel is not fundamental in all felony cases.

Conclusion

I am not asking the Supreme Court of the United States to decide anything in this case except that under the facts and circumstances presented under the laws and constitution of the State of Florida, and the Constitution of the United States, that a young man of the age of eighteen could not have obtained a fair and impartial trial without the benefit of counsel which he asked for in this case. The Judge of the District Court, who heard the facts, who saw the defendant himself, who heard the witnesses, decided that point in this particular case under the particular facts.

The State of Florida is depending entirely upon the case of *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, to sustain them in their contentions. The facts in the case of *Betts* v. *Brady, supra,* are entirely different from the facts in the present case. In that case, the man was 44 years of age and he was tried directly before the Judge himself, without a jury. As the court said in that case on page 1607 of the decision: "It is obvious that the Judge can much better control the course of the trial, and is in a better position to see impartial justice done, than when the formalities of a jury trial are involved." It seems that the majority of the Supreme Court recognize that principle of law. In addition thereto, the only question involved in that case was a question of alibi and none of the technicalities involved in a plea of not guilty and a jury trial. As I understand this

case, when for the reasons well set out, the court held that it did not think there was any violation of the due process clause of the Constitution of the United States.

There cannot be any doubt but that if this case had been brought before the Supreme Court under the facts and circumstances as shown in this record, there would be a reversal without question. For that reason, I have not set out many of the decisions of the Supreme Court of the United States along this line. Many of these cases hold that the right to counsel in criminal proceedings is fundamental. *Powell* v. *Alabama*, 287 U. S. 45, 70, 77 La. Ed. 158-171.

In the case of *Deeb* v. *State*, 131 Fla. 362, 179 Sou. 894, our Supreme Court of the State of Florida said: "Requirement of this section that accused be heard by himself or counsel or both, is more than a right secured to accused and is a mandatory organic rule of procedure in all criminal prosecutions." In *Cutts* v. *State*, *Supra*, the Supreme Court of Florida said: "It has been the general practice in trial courts in this state, when a party charged with felony has been brought to the bar for arraignment, to inquire of the accused whether he had counsel to represent him, and if, upon inquiry, it developed that he had no attorney and was unable to employ one, to ask the accused whether he desired one to represent him. If he signified his desire to be represented by counsel, then it has been the practice for the trial judge to appoint some attorney to represent the accused. This practice is in accord with the letter and spirit of section II of the Bill of Rights and Section 3969 of the General Statutes of 1906."

It seems that the Supreme Court of the United States recognized that under certain circumstances, such a denial of the request of an indigent defendant would be grounds for reversal as set out in *Betts* v. *Brady*. As was said in this case at page 86 of Law Ed. 1609, 316 U. S. 476, the dis-

senting opinion in the Supreme Court of the United States said: "Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the 'universal sense of justice' throughout this country." In 1854, for example, the Supreme Court of Indiana said: "It is not to be thought of in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial."

I believe that the court will take judicial cognizance of the fact that the preparation of a trial and being ready with your witnesses and the law of the case at the time of the trial, is probably more necessary than any other thing that a lawyer could do. To give his client a fair and impartial trial, under the law and facts, is to my mind the most important duty. I have refrained all during my practice to accept employment unless I had time in which to do that very thing. Our Constitution provides that you have got to be given time for preparation for trial. It is a recognized and fundamental principle of our procedure in the trial of criminal cases. May I be permitted to ask the court could a person eighteen years of age, without any knowledge of the practice and procedure in the trial of a criminal case, who is held in jail from about February 19th to March 14th, who is unable to employ counsel to represent him, who is unable to make the necessary preparations for trial by reason of his poverty and being held in jail himself, could you expect that he received a fair and impartial trial under such circumstances? I am only asking in this case for a decision by the Supreme Court based upon these facts, which are disputed. He was unable to employ counsel, he advised the court of this fact, he was only eighteen years of age, he was held in jail without the opportunity of being out and

doing something himself. I do not believe under these circumstances that we can truthfully say that he received a fair and impartial trial and that due process of law was guaranteed to him as provided under the Constitution of the United States under the facts in this case.

I am only interested in this case from the fact that I was brought up and reared in my early practice in the State of Georgia with the idea that in order to obtain a fair and impartial trial when charged with a serious felony, it was necessary that a lawyer be appointed in behalf of the defendant. There was never a case tried up there where a person was unable to employ counsel on account of his poverty but that the court appointed counsel to represent him. There is no legislative fiat requiring such. It is a recognized principle of the law. The attorney who is appointed by the court serves without remuneration, even in a capital case. I was brought up under that system, which I believe embodies the true principle of due process of law and a fair and impartial trial. A fair and impartial trial should prevail in every state. Without counsel to make the preparations, see that the witnesses are subpoenaed, see that you are properly charged, and to guide and lead every step of the trial, is a denial of a fair trial and due process of law. Georgia never paid a dime for these appointments. Florida pays in capital cases. But certainly, the fact that it pays only in capital cases, is no argument that you can obtain a fair trial without counsel in a serious felony. Such an act of legislature is no determination of our rights guaranteed to us under the Constitution of the State of Florida and the United States. That question is for determination only by the judiciary.

Respectfully submitted:

E. M. Baynes,
Attorney for Petitioner.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 40

DONALD WADE,

Petitioner,

vs.

NATHAN MAYO, AS STATE PRISON CUSTODIAN OF THE STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

E. M. BAYNES,
Counsel for Petitioner,
604 Comeau Bldg.,
West Palm Beach, Florida.

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Cases Cited

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SUPPLEMENTAL BRIEF OF PETITIONER

On the 10th of November, 1947, this case was ordered restored to the docket for reargument, and assigned for hearing immediately following No. 398. Counsel was requested to discuss in brief and argument, the following two questions: (1) The propriety of the exercise of jurisdiction by the District Court in this case, when it appeared of record in the State's motion for dismissal on appeal of *habeas corpus*, that petitioner had not availed himself of the remedy of appeal from his conviction, apparently

open after trial, though now barred by limitation. (2) Whether the failure of Florida to make this objection in this proceeding affects the above problem.

Frankly, after my serious experience and severe shock which I suffered on last Christmas Eve, I do not know whether I am capable at this time of giving serious thought to the questions presented by the Court. However, I will do the best I can under the circumstances.

There does not seem to be any serious dispute but that *habeas corpus* is a remedy recognized by both the State of Florida and the United States as a proper remedy to be used in the courts of either the State or the Federal Government to test the legality where a person is accused of being held in restraint of liberty in violation of his constitutional rights.

Believing that such was the law, the petitioner in this case appealed to the Circuit Court of Palm Beach County, Florida, by way of *habeas corpus,* setting up that he was restrained of his liberty by the denial of the constitutional right of counsel in his trial in the said court (R. 5). The Circuit Court granted a motion to quash the writ (R. 5-6). There was an appeal to the Supreme Court of Florida, and upon motion of the Attorney General, the appeal was dismissed as being frivolous. The only question which I attempted to raise in this *habeas corpus,* was the fact that the petitioner had been denied his right of counsel guaranteed to him by the Constitution of the State of Florida and the United States, and that by reason of this denial to appoint counsel for him when he had requested it, was a denial of due process of law guaranteed to him by the 14th Amendment.

There does not seem to be any doubt but that the Supreme Court of Florida, in dismissing the appeal, passed upon the very question raised in the *habeas corpus* proceeding in the Circuit Courts.

It is true that the Supreme Court in passing upon the Wade appeal, did not set out the reasons for dismissing this appeal, but in the case of *Johnson* v. *Mayo*, State Prison Custodian, 28 Sou. (2d) 585, the Supreme Court did set out in that particular case the reasons for the dismissal in the *Donald Wade* case, the present case before this Court. I quote from this decision at page 586:

"In May, 1945, Donald Wade presented his appeal to this Court from a judgment quashing a writ of habeas corpus theretofore issued by the Circuit Court of Palm Beach County on the petition of Donald Wade alleging that he had been unlawfully convicted of the commission of a felony in Palm Beach County in that 'at the time of his trial, conviction and sentence he was without aid of counsel and the court did not make an appointment of counsel, nor did petitioner waive his constitutional rights to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to go to trial without the aid of counsel.' It was also alleged that he was ignorant and was also, because of lack of funds, unable to employ counsel; and that he requested the court to appoint counsel for him. He further alleged that he was not guilty of the offense charged.

Motion was made to dismiss the petition on the ground that the appeal was frivolous and on May 14, 1945, we entered an order granting the motion to dismiss on the ground stated.

We recognize the fact that in a great number of cases in other jurisdictions courts have construed provisions of respective State Constitutions similar to ours to guarantee to a defendant charged with a felony the benefit of counsel.

We are also cognizant of the rule in the Federal Courts but we are of the view that those decisions do not control in Florida."

It will be observed that the Supreme Court of Florida said that they were cognizant of the rule in the Federal Courts, but were of the view that those decisions do not control in Florida.

We believe that the right to inquire into restraint of a person's liberty in violation of his constitutional rights is provided by a Federal Statute itself. 28 U. S. C. A. 452 provides:

"POWER OF JUDGES. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

In the case of *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, 1467, the Supreme Court of the United States said as follows:

"True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the

person, even if such inquiry involves an examination of facts outside of, but not inconsistent with, the record.' Congress has expanded the rights of a petitioner for habeas corpus and the '. . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the Act of 31 Car. II, chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . . '. . . it is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond forms and inquire into the very substance of the matter, . . .'

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty."

In the case of *Ex Parte Hawk*, 321 U. S. 114-116, 88 L. Ed. 572, 575, the Supreme Court said as follows:

"Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. Salinger *v.* Loisel, 265 U. S. 224, 230-232, 68 L. Ed. 989, 996, 997, 44 S. Ct. 519. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see Mooney *v.* Holohan, supra (294 U. S. 115, 79 L. Ed. 795, 55 S. Ct. 340, 98 A. L. R. 406), or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. Moore *v.* Dempsey (261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265); Ex parte Davis, 318 U. S. 412, 87 L. Ed. 868, 63 S. Ct. 679, a federal court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus.

As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion."

Frankly, I was following this advice as set out in the opinion of the case of *Ex Parte Hawk, Supra.* Where counsel was refused to a pauper charged with a serious crime when he requested counsel, we respectfully show that this was a violation of not only the State Constitution, but the 6th and 14th Amendments to the Federal Constitution. When the Supreme Court of Florida dismissed the appeal from the Circuit Court in the *habeas corpus* case, we believe that this was a denial of the due process clause of our

Constitution guaranteed by the 14th Amendment. The Supreme Court of Florida said in the case of *John R. Johnson* v. *Nathan Mayo*, as shown in the record at page 72 of the record "We are also cognizant of the rule in the Federal Courts, but we are of the view that those decisions do not control in Florida."

In the case of *Williams* v. *Kaiser*, 323 U. S. 471-485, 89 L. Ed. 398, 406, the Supreme Court of the United States lay down the rule "State Courts are no less under duty to observe the United States Constitution than is this Court. To be sure, authority is vested in this Court to see to it that that duty is observed."

The Supreme Court said in the case of *White* v. *Ragen*, 324 U. S. 760-768, 89 L. Ed. 1348, 1349, as follows:

"When a state court committed to the policy of refusing to entertain original applications for habeas corpus save on a record which excludes on its face the possibility of any trial in that court of an issue of fact, denies an application without opinion or other indication of the ground of its decision, and when the petition relies on allegations of fact to raise Federal questions, it is unnecessary for the petitioner, in order to exhaust his state remedies so as to be in a position to apply to a Federal district court for a writ of habeas corpus, to apply to the Supreme Court of the United States for certiorari to review the judgment of the state court."

In the case of *Henry Hawk* v. *Neil Olson*, 326 U. S. 271-279, 90 L. Ed. 61, the Supreme Court of the United States said:

"Since the enactment of the statute (14 Stat. 385, c. 28, 28 U. S. C. 453), empowering Federal courts to examine into restraints of liberty in violation of the Constitution of the United States, habeas corpus in a Federal court by one con-

victed of a criminal offense is a proper procedure to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution, even though the events alleged to infringe do not appear upon the face of the record of his conviction."

"Where a corrective process is provided by a state to one whose conviction of crime violates a Federal constitutional right, but error in relation to the Federal question of constitutional violation creeps into the record, the Supreme Court has the responsibility to review the state proceedings."

I must admit to the court that under the various decisions rendered by the Supreme Court of the United States relative to the question before you at this time, that I might not have correctly interpreted the decision of the Supreme Court. I know, further, the question itself is rather a delicate question. However, the one point that I wanted to try out in this case was whether a pauper who had requested counsel and it had been refused, could get the Supreme Court of the United States to say that he had been denied due process of law in violation of the 14th Amendment. I thought it was proper for me to carry that question before the Supreme Court of the State, before appealing to the Federal Court. I did this by *habeas corpus*, which is allowed under our law. The Supreme Court said that the Federal Court's decisions do not control in Florida. I could not go any further than that.

Then I could not file a *habeas corpus* at that particular time in the Federal Court to test out the question, for the reason of another sentence of the defendant, and had to wait. I could not have done otherwise. When that time had elapsed, time for any appeal to the United States Supreme Court from the Supreme Court of Florida had

expired. My only remedy was a *habeas corpus* in the Federal District Court. At least, that is what I decided after reading the case of *Hawk* v. *Olson, supra,* in which they set out as follows:

"Refusal of a proper request for counsel, because of the accused's incapacity adequately to defend himself, Williams *v.* Kaiser, 323 U. S. 471, 472, 89 L. Ed. 398, 400, 65 S. Ct. 363, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See Tomkins *v.* Missouri, 323 U. S. 485, 89 L. Ed. 407, 65 S. Ct. 370; Cochran *v.* Kansas, 316 U. S. 255, 86 L. Ed. 1453, 62 S. Ct. 1068. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. Powell v. Alabama, supra (287 U. S. 52, 58, 77 L. Ed. 162, 165, 53 S. Ct. 55, 84 A. L. R. 527); House *v.* Mayo, 324 U. S. 42, 89 L. Ed. 739, 65 S. Ct. 517. Compare Ex Parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448; Glasser *v.* United States, 315 U. S. 60, 69, 70, 86 L. Ed. 680, 698, 699, 62 S. Ct. 457. When the state does not provide corrective judicial process, the Federal Courts will entertain habeas corpus to redress the violation of the Federal constitutional right. White *v.* Ragen, 324 U. S. 760, 89 L. Ed. 932, 65 S. Ct. 978. When the corrective process is provided by the state but error in relation to the Federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. Williams *v.* Kaiser, 323 U. S. 471, 472, 89 L. Ed. 398, 400, 65 S. Ct. 363; Tomkins *v.* Missouri, 323 U. S. 485, 89 L. Ed. 407, 65 S. Ct. 370, supra."

Also, the Federal law provides that the Federal courts will entertain questions where it is claimed that a restraint is made in violation of constitutional provisions of the Federal Constitution. See 28 U. S. C. A. Secs. 451, 452 and 453. These sections of our law specifically provide for

habeas corpus to test out the unlawful restraint in violation of the Constitution. In addition to that, the Supreme Court of Florida, as I have pointed out in several cases, held that it is necessary for an accused to have counsel to secure a fair trial under the laws of this State.

I have tried to keep all other questions out of this case, with the exception of one question where a person is unable, by reason of his poverty, to employ counsel and requests that counsel be appointed to represent him in a serious felony, is it a denial of due process to deny that request of counsel—is such a procedure a fair trial under the constitutional laws of this State or the United States, and does it not violate the Sixth and Fourteenth Amendments of the Federal Constitution?

In the case of *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 347, 98 A. L. R. 406, the Supreme Court of the United States seemed to have come to the conclusion that a violation of the Fourteenth Amendment in restraining the liberty of a person can be taken advantage of either in the State Court or the Supreme Court of the United States by way of *habeas corpus*. The Court says:

"We are not satisfied, however, that the State of California has failed to provide such corrective judicial process. The prerogative writ of habeas corpus is available in that State. Constitution of California, Art. 1, Sec. 5; Art. 6, Sec. 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 S. Ct. 544.

In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the State has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose."

It must be observed that the Supreme Court of the United States has held that the compliance with the Constitutional mandates as contained in the Sixth and Fourteenth Amendments is an essential jurisdictional prerequisite to deprive an accused of his life or liberty. In other words, the question presented is a test to determine the jurisdiction of the state court to proceed to a judgment. The case of *White* v. *Ragen*, 324 U. S. 760-768, 89 L. Ed. 1348, holds: "Due process requires that the defendant on trial in a state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel, and that he shall not be forced to trial without such expedition as to deprive him of the effective aid and assistance of counsel."

The question of the jurisdiction of the State Court being brought before the court has always been recognized to be a prerogative of the *habeas corpus* proceeding. This was recognized as a law of this country long before the present statute giving the right of *habeas corpus* to the Federal Courts in cases of the unlawful restraint of liberty. Especially is this true where this restraint of liberty is brought about from the fact that the State Court acted without jurisdiction. "One in custody pursuant to final judgment of state court of criminal jurisdiction may have judicial inquiry in federal court, or before a judge of such court into truth and substance of cause of his detention, even though it is necessary to look behind record of his conviction to test jurisdiction of state court. Flansburg *v.* Kaiser, D. C. Mo. 1944, 54 F. Supp. 423."

In the case of *Hugh Allen Bowen* v. *James A. Johnston*,

306 U. S. 19-30, 83 L. Ed. 455, the Supreme Court said at page 459: "If it be found that the Court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights had been denied, the remedy of habeas corpus is available."

Following this argument of the Supreme Court of the United States, we find this enunciation in the case of *Johnston* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 as follows: "If the accused is not represented by counsel and has not competently and intelligently waived his constitutional rights, the jurisdiction of the court is lost, the judgment of conviction pronounced by the court is void, and release from imprisonment may be obtained by habeas corpus."

Under the many rulings which have been made by the Supreme Court of the United States in the many cases before it where the due process clause of the United States Constitution was involved and under the claim that his constitutional rights had been violated, I was of the candid and honest opinion that you did not have to appeal or ask for certiorari in such cases from the decision of the Supreme Court of the State of Florida. This was purely a constitutional question involved and the jurisdiction of the court was involved. It has been held that the court loses its jurisdiction when it violates the due process by not appointing counsel for an indigent defendant. To hold otherwise would be a confusion in our procedure, which in fact would deny the constitutional provisions of our law of due process.

The next question is whether the failure of Florida to make this objection in this proceeding effects the above problem.

Frankly, I suppose that counsel from the State of Florida believe as I did, that the remedy of *habeas corpus* was available where a person's claims that his constitutional rights have been violated under the due process clause of the Constitution of the United States. Therefore, no

objection was made to the proceedings by the State of Florida.

In addition to that fact, this *habeas corpus* filed in the District Court at Jacksonville, Florida, for the Southern District of Florida, was not filed until long after time of appeal on the decision of *habeas corpus* had expired. This was months after this decision by the Supreme Court of the State of Florida, and on account of the poverty of the defendant, no appeal was thought about at the time at which appeal could have been taken. I think the court must be in error, brought about from the fact that the first *habeas corpus* filed in the District Court might have been made during the time that appeal might have been taken. However, the first *habeas corpus* was denied, without prejudice. Later on another *habeas corpus* was brought, but this was brought, to the best of my recollection, after the time for appeal had expired from the final decision of the Supreme Court of Florida to the United States Supreme Court.

Conclusion

I have been laboring under rather extreme difficulties in attempting to file the foregoing brief. Laboring under these conditions, I have not, it seems, been able to concentrate.

I have endeavored to bring before the Supreme Court of the United States the question as to whether it was a denial of the due process clause of the Constitution of the United States, for a State Court to refuse or deny the appointment of counsel for an indigent defendant unable to employ counsel when charged with a serious felony.

Respectfully submitted,

E. M. Baynes,
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 40

DONALD WADE,
PETITIONER,

vs.

NATHAN MAYO, as State Prison Custodian of the State of Florida,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT.

J. TOM WATSON
Attorney General of Florida
Tallahassee, Florida
Attorney for Respondent.

REEVES BOWEN
SUMTER LEITNER
Assistant Attorneys General,
Of Counsel.

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BRIEF OF RESPONDENT

OPINIONS OF THE COURTS BELOW

The judgment of the District Court is found in the record (Tr. 53-54). The District Court's Supplemental Memorandum, which was by its terms made a part of said judgment, is also exhibited by the record (Tr. 61-62).

The opinion of the Circuit Court of Appeals for the Fifth Circuit, which is here for review on writ of certiorari, is reported in 158 Federal Reporter, 2d Series, at page 614.

JURISDICTION

The jurisdiction of this Court is based upon U.S.C.A. 28, Section 347(a).

STATEMENT OF THE CASE

The petitioner is a young man who was eighteen years old at the time of his trial in the State Court, and who has an eighth grade education. In November, 1943, he was tried in Jackson County, Florida, upon a charge of burglary (breaking and entering); he pled guilty thereto and was sentenced to serve a term of two years in the Florida State Prison from and after the 10th day of November, 1943. Having served a portion of this time, he was released under parole.

While under such parole, he was charged in the Criminal Court of Record of Palm Beach County with the crime of burglary. The information in said case was filed against the petitioner on the 19th day of February, 1945; he was arraigned on February 20, 1945, and pled not guilty. He was again before the Court on March 6, 1945, when his case was set for trial on March 14, 1945. The father and mother of the petitioner tried to obtain counsel for him, but were unable to do so. On the day of his trial, to-wit: March 14, 1945, the petitioner asked the trial court to appoint counsel to defend him but this request was denied by the trial court. On said date, he was tried before a jury and was convicted of said crime of burglary, for which he was sentenced to serve a term of five years in the State Prison.

After the said conviction and sentence in the Criminal Court of Record of Palm Beach County, the appellant filed in the Circuit Court of said County, his petition for a writ of habeas corpus, in which he alleged that because of said trial court's refusal to appoint counsel for him he was denied due process of law guaranteed him by the Constitution and laws of the United States and the Constitution and laws of the State of Florida. The writ of habeas corpus which was issued pursuant to said petition was thereafter quashed by order of said Circuit

Court. Thereupon, the petitioner appealed from said order to the Supreme Court of the State of Florida, and, upon motion of the Attorney General, the said appeal was dismissed by said Supreme Court.

Thereafter, on May 10, 1946, the petitioner filed in the District Court for the Southern District of Florida, Jacksonville Division, his petition for a writ of habeas corpus in which he alleged that when his said burglary case was called for trial in the Criminal Court of Record in Palm Beach County, he stated to the presiding Judge that he was without money with which to employ counsel and asked the Court to appoint counsel for his defense, and that said request was denied; that he is eighteen years of age (his testimony showed that he was eighteen years old at the time of his trial on said burglary charge); that he is possessed of only an eighth grade education; that he is unfamiliar with the procedure and practice in the courts, and that he was forced to trial without the aid of counsel in violation of his constitutional right guaranteed him under the Constitution of the United States; that he does not think that an appeal to the Supreme Court of Florida would be of any use to him for the reason that the Supreme Court of Florida has decided in two cases that it has no power, except in capital cases, to reverse convictions because the defendants were not represented by counsel (Tr. 1-8).

Said United States District Court issued a writ of habeas corpus on said petition (Tr. 9-10).

The respondent duly filed his return to said writ, in which return he denied that the petitioner's rights were violated by the trial court's refusal to appoint counsel for his defense, and denied that the petitioner was tried, convicted and sentenced without due process of law. Among other things, said return alleged that the petitioner was literate and intelligent; that the information

was filed against the petitioner on February 19, 1945; that he was arraigned several weeks before the trial, and at a later date was before the Court when the case was assigned for trial upon a day certain, but that upon neither occasion did petitioner make any request for the appointment of counsel or any representation to the Court that he was without funds or resources with which to employ counsel; that when the case was called for trial on March 14, 1945, petitioner, for the first time, requested the Court to appoint such counsel, which request was properly denied; that during the progress of impaneling a jury, he was advised of his right to challenge jurors and to excuse as many as six jurors without assigning any reason therefor, and, after being so advised, accepted a jury tendered by the State; that the State produced evidence quite sufficient to sustain the verdict of guilty rendered by the jury; that the petitioner was afforded opportunity and advised of his right to cross examine the State's witnesses, but declined to avail himself of such right; that he took the stand and testified fully in his own behalf; that no argument to the jury was made by either side; that the trial judge charged the jury fairly and in accordance with the law, and the jury brought in the verdict of guilty which is the basis of the petitioner's conviction, sentence and commitment; that the petitioner was not a stranger to criminal procedure and that he fully presented his defense and was given a fair and impartial trial (Tr. 10-16).

Testimony was duly taken in said habeas corpus case. Thereafter, on May 18, 1946, said United States District Court entered its final judgment (Tr. 53-54), and on May 29, 1946, filed in connection with and as a part of said judgment its supplemental memorandum (Tr. 61-62), which judgment and memorandum held that the petitioner "though not wholly a stranger to the court room, having been convicted of prior offenses, was still an in-

experienced youth unfamiliar with court procedure and not capable of adequately representing himself;" that Section 11 of the Declaration of Rights of the Florida Constitution, as construed by the Supreme Court of Florida, created a mandatory organic rule of procedure, essential to a fair trial in all criminal prosecutions and in all courts of the State of Florida that an indigent accused has a right to the appointment of counsel upon request; that a failure upon the part of the court to so appoint counsel is a denial to the party accused of a fair trial contrary to Section 11 of the Declaration of Rights of the Florida Constitution, and constitutes a denial of due process contrary to the fourteenth amendment to the Federal Constitution; and that, because of the denial of the petitioner's request for counsel, the judgment and sentence entered against him by the Palm Beach Criminal Court of Record was null and void. Said judgment discharged the petitioner from the custody of the respondent and remanded him to the custody of the sheriff of Palm Beach County, Florida, for further proceedings under the information.

The respondent appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the judgment of the District Court.

The matter is now pending in this Court upon writ of certiorari granted by this Court to review the Circuit Court of Appeals' judgment of reversal.

QUESTIONS INVOLVED

The questions presented are as follows:

1. DID THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DENY THE PETITIONER ANY RIGHT GUARANTEED BY THE LAWS OF FLORIDA, AND PARTICULARLY BY SEC-

TION 11 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA?

2. UNDER THE CIRCUMSTANCES INVOLVED, DID THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DEPRIVE HIM OF DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION?

ARGUMENT

FIRST QUESTION

THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DID NOT DENY THE PETITIONER ANY RIGHT GUARANTEED BY THE LAWS OF FLORIDA.

The statutes of Florida do not require the Court to appoint counsel for indigent persons except in capital cases. (See governing Section 909.21, Florida Statutes, 1941, set out in the appendix hereto attached).

The petitioner relies on Section 11 of the Declaration of Rights of the Florida Constitution, which reads as follows:

> "Sec. 11. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

The only cases found by us which are entitled to be classed as authority on the question of whether Section 11 of the Declaration of Rights of Florida requires the appointment of counsel for indigent defendants in non-capital felony cases are: Cutts v. State, 54 Fla. 21, 45 So. 491; Weatherford v. State, 76 Fla. 219, 79 So. 680; Myers v. State, 84 Fla. 508, 94 So. 507; Watson v. State, 142 Fla. 218, 194 So. 640; Johnson v. State, 148 Fla. 510, 4 So. 2d. 671; Donald Wade v. State, 155 Fla. 906, 23 So. 2d. 163; and John R. Johnson v. State, 26 So. 2d. 585 (not yet reported in Florida Reports).

We have found a number of other Florida cases (which we will hereinafter discuss) in which mention is made of the right to counsel, but none of them involved a decision of the question here under consideration, viz., as to whether Florida law requires the appointment of counsel for indigent defendants in non-capital felony cases; and therefore any language used in said cases which might be thought to supply the answer to said question was obiter dicta which conflicted with the holdings in the above named cases wherein the question was actually involved.

In Cutts v. State, supra, (cited in the petitioner's brief) one of the grounds urged for reversal was that no attorney had been appointed for the accused, who had been convicted of first degree murder and given the death penalty. In that case, the Supreme Court of Florida said:

> *"It has been the general practice in trial courts in this state,* when a party charged with felony has been brought to the bar for arraignment, to inquire of the accused whether he had counsel to represent him, and if, upon inquiry, it developed that he had no attorney and was unable to employ one, to ask the accused whether he desired one to represent him. If he signified his desire to be

represented by counsel, then it has been the practice for the trial judge to appoint some attorney to represent the accused. *This practice is in accord with the letter and spirit of section 11 of the Bill of Rights* and section 3969 of the General Statutes of 1906." (Emphasis supplied)

* * * *

"While the practice in this state has been as indicated above, still there is no law requiring it, and it is not usual for the record to show that this practice is observed." (Emphasis supplied)

If, in the Cutts case the Supreme Court of Florida had contented itself with observing that the practice of appointing counsel accorded with the letter and spirit of Section 11 of the Bill of Rights, then the Cutts case would be substantial authority for the position that said constitutional and statutory provisions required the appointment of counsel in a felony case. However, by thereafter stating "While the practice in this state has been as indicated above, still there is no law requiring it," the Supreme Court of Florida definitely held that Section 11 of the Florida Bill of Rights does not require the appointment of counsel.

In Weatherford v. State, supra, (cited in the petitioner's brief) the Supreme Court of Florida cited with approval the above quotations from the Cutts case.

Also, in Myers v. State, supra, the Supreme Court of Florida quoted from Cutts v. State, supra, as follows:

" 'Every person accused of crime has a right to have counsel to aid him in his defense, but no one is compelled to employ counsel. If the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is not ground for reversal, unless it further appears that the right to have counsel was denied. It is not to be presumed that the right was denied.' "

However, said quotation from Myers v. State deals only with the denial of the right to have counsel—not with the question of whether the Court must appoint counsel. And we again call attention to the Supreme Court's statement in the same Cutts case from which the above quotation was cited, that "there is no law requiring it" (the appointment of counsel).

Our construction of the Cutts case is that adopted by this Court in Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595 (text 1605), wherein this Court, in discussing the requirements of the Constitutions of the several states as to the appointment of counsel, said:

> "The constitutions of all the states, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. Those of nine states may be said to embody a guarantee textually the same as that of the Sixth Amendment or of like import. In the fundamental law of most states, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice."
>
> "In three states the guarantee, whether or not in the exact phraseology of the Sixth Amendment, has been held to require appointment in all cases where the defendant is unable to procure counsel. *In six the provisions (one of which is like the Sixth Amendment) have been held not to require the appointment of counsel for indigent defendants.*" (Emphasis supplied)

and in the footnote to the last sentence of said quoted matter, being Footnote 24, this Court correctly construed Cutts v. State, supra, as authority for including Florida among the six states wherein the state constitutional provisions have been held not to require the appointment of counsel for indigent defendants.

In Watson v. State, supra, it was contended on appeal that the accused in a felony case (not capital) had been denied the right to a fair and impartial trial as guaranteed by the Constitution because the said accused were not assisted by counsel during the trial. In disposing of this contention adversely to the appellants, the Supreme Court of Florida said:

> "The Legislature of Florida, by the enactment of Section 8375, C.G.L., restricts the power of the courts to appoint counsel for indigent defendants at public expense to capital cases. *The case at bar is not a capital case and therefore no duty rested on the lower court to supply counsel for plaintiffs in error at public expense.*" (Emphasis supplied)

It is true that in said Watson case the Supreme Court of Florida made no specific mention of Section 11 of the Declaration of Rights, but it is equally true that said Section 11 was in existence at the time of said decision and had just as much binding force and effect then as it has now, no more and no less. And, it is also true that the Supreme Court of Florida, with full knowledge of the existence and import of Section 11, and in the face of Watson's contention that he had been denied a fair and impartial trial as guaranteed by the constitution because he had not been assisted by counsel unequivocally said that no duty rested on the lower court to supply counsel for the accused at public expense because the case was not a capital case. Further, in the Watson case the Supreme Court of Florida gave full scope and effect to Section 8375, C.G.L. (whose provision for the appointment of counsel in capital cases only is brought forward in Section 909.21, Florida Statutes, 1941, said Section 909.21, being set out in the appendix attached hereto), despite the existence of Section 11 of the Florida Bill of Rights, and this was in effect a holding that said statute

furnished the applicable rule and that Section 11 of the Declaration of Rights imposed no additional duty to appoint counsel.

In Johnson v. State, supra, the Supreme Court of Florida had under consideration a non-capital felony conviction for manslaughter wherein one of the grounds of complaint was that because of things beyond the control of the accused he had to go to trial without counsel, although he had theretofore relied upon having counsel to represent him. In disposing of this contention adversely to the contentions of the accused the Supreme Court of Florida said:

> *"There was no duty resting upon the trial court to appoint counsel to represent the accused as he was not charged with a capital offense.* See Sec. 157, Criminal Procedure, Acts 1939, c. 19554; Watson et al. v. State, 142 Florida 218, 194 So. 640." (Emphasis supplied)

thereby in effect holding that Section 157 of the Criminal Procedure Act of 1939 (now Section 909.21, Florida Statutes, 1941; see appendix hereto for text), which does not require the appointment of counsel except in capital cases, provides the controlling rule in Florida. Here, again, the Supreme Court of Florida did not in so many words mention Section 11 of the Bill of Rights, but said Section 11 was in existence, and, by holding that the statute prescribed the applicable rule, the Florida Court in effect held that said Section 11 provided no rights to an accused which were not provided by the statute.

The case of Donald Wade v. State, supra, involved an appeal to the Supreme Court of Florida which was taken by the petitioner in the case at bar from the judgment of the Circuit Court of Palm Beach County, Florida, remanding the petitioner herein to the custody of the Sheriff of said county in a habeas corpus case brought

by the petitioner. The only thing shown in the official report of said case in 23 So. 2d. 163 is that the appeal was dismissed on motion of the Attorney General, and therefore it is necessary to go into the background which furnished the basis for such dismissal. The records of the Supreme Court of Florida reveal that the petitioner, Donald Wade, after his conviction for the very offense involved in the habeas corpus proceeding in the case at bar, filed a petition for writ of habeas corpus in which he made substantially the same allegations as he made in the case at bar as to his request for appointment of counsel having been denied by the trial court, and as to his need of and financial inability to procure counsel; that in said State Circuit Court he alleged in his petition that by reason of the refusal of the trial court to appoint counsel for him, he was deprived of the due process of law guaranteed under the Constitution and laws of the State of Florida, and of the United States of America; that writ of habeas corpus was issued on said petition; that upon the authority of Watson v. State, supra, and Johnson v. State, supra, the said Circuit Court made its order quashing the said writ of habeas corpus and remanding the petitioner to the custody of the respondent sheriff; that the petitioner appealed from said order to the Supreme Court of Florida; that the Attorney General moved to dismiss the appeal upon the ground that it was frivolous and without merit; that in response to said motion to dismiss the appeal the petitioner, by counsel, filed his brief on the merits, in which brief he renewed his contention that he had been denied due process of law under the State and Federal Constitutions; and that after the filing of said brief the said Supreme Court considered and acted upon said motion to dismiss and made the order granting same which is set out in 23 So. 2d. 163. Consequently, the order made by the Supreme Court of Florida dismissing the petitioner's above mentioned ap-

peal as being frivolous and without merit necessarily had the effect of holding that the petitioner had not been denied due process of law under Section 11 of the Bill of Rights of the Florida Constitution or under any other provision of the Florida Constitution.

In John R. Johnson vs. State, supra, Johnson filed in the Supreme Court of Florida a petition for writ of habeas corpus in which he alleged that he had been put on trial for the larceny of an automobile, a non-capital felony, without the aid of counsel; that he had advised the court that he was without funds to employ counsel and had requested the court to appoint counsel for him; and that the Court's refusal to appoint counsel for him was a violation of Section 11 of the Declaration of Rights of the Constitution of Florida and of the Fourteenth Amendment to the Constitution of the United States. In denying the writ of habeas corpus applied for by Johnson, the Supreme Court of Florida said:

> "So it is that the sole question presented for our consideration and determination is, whether or not under the Constitution and statutes of the State of Florida the judge of a trial court is required to appoint counsel to defend an indigent defendant when put upon trial under an indictment or in charging such defendant with the commission of a felony. Section 11 of the Declaration of Rights is as follows:
>
> " 'Sec. 11. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him.'

"The only statute which we have in this State touching upon the question here under consideration is Section 909.21, Fla. Statutes, 1941, same F.S.A., which provides for the appointment by the trial judge of counsel for an insolvent defendant who is charged with a capital offense. This section of the statute limits requirement, that counsel be appointed by the court for indigent defendants to those defendants who are charged with the commission of a capital offense. *Our construction of Sec. 11 of our Declaration of Rights is that any defendant charged with a felony in the courts of this state shall have the right to be heard in his own defense in his own proper person and also by counsel, if he has counsel, and presents himself and his counsel at the bar of the court where he is to be heard. But this constitutional provision does not require that he should provide himself with counsel, nor does it require that the State should furnish him counsel to be selected and appointed by the trial court.* (Emphasis supplied)

"We have repeatedly held that in cases where the charge was less than a capital offense no duty rested upon the trial court to supply counsel for the defendant. See Cutts v. State, 54 Fla. 21, 45 So. 491; Watson et al. v. State, 142 Fla. 218, 194 So. 640; Johnson v. State, 148 Fla. 510, 4 So. 2d. 671.

"In May, 1945, Donald Wade presented his appeal to this Court from a judgment quashing a writ of habeas corpus theretofore issued by the Circuit Court of Palm Beach County on the petition of Donald Wade alleging that he had been unlawfully convicted of the commission of a felony in Palm Beach County in that 'at the time of his trial, conviction and sentence he was without aid of counsel and the court did not make an appointment of counsel, nor did petitioner waive his constitutional rights to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was com-

pelled to go to trial without the aid of counsel.' It was also alleged that he was ignorant and was also, because of lack of funds, unable to employ counsel; and that he requested the court to appoint counsel for him. He further alleged that he was not guilty of the offense charged.

"Motion was made to dismiss the petition on the ground that the appeal was frivolous and on May 14, 1945, we entered an order granting the motion to dismiss on the ground stated.

"We recognize the fact that in a great number of cases in other jurisdictions courts have construed provisions of respective State Constitutions similar to ours to guarantee to a defendant charged with a felony the benefit of counsel.

"We are also cognizant of the rule in the Federal Courts but we are of the view that those decisions do not control in Florida.

"We shall not refer to what has been said by this Court concerning the right of an indigent defendant charged with a capital offense to have counsel appointed by the court to conduct his defense because that right does not flow from Section 11 of our Declaration of Rights, but does flow from a statute, Section 909.21, supra."

The holdings in said late cases of Watson v. State, supra, Johnson v. State, supra, Donald Wade v. State, supra, and John R. Johnson v. State, supra, are strictly in line with the Florida Supreme Court's earlier pronouncement to the same effect in Cutts v. State, supra.

The petitioner cites Walker v. State, 150 Fla. 476, 8 So. 2d. 22, but that case had nothing to do with the right of an indigent accused to have the court appoint counsel for him. Walker's contention was that his confession was obtained from him illegally because he "had been drinking, was taken into custody and placed in jail and *deprived of the privilege of securing an attor-*

ney." It was with respect to this contention (which had nothing to do with the right to have the court appoint counsel) that the Florida Supreme Court said that:

> "Officers in their zeal to enforce the criminal laws are bound to recognize that men charged with crime have fundamental rights that must be safeguarded, and among these is representation by counsel. These fundamental rights must be respected and observed when enforcing the criminal laws."

The petitioner cites Deeb v. State, 131 Fla. 362, 179 So. 894, but that case is not in point because it did not concern the question of whether an indigent accused has the right to have the court appoint counsel for him. It is true that the Florida Supreme Court made the following statement which, if considered without reference to the point before said Court for decision, is susceptible to the interpretation placed upon it by the petitioner, to-wit:

> "The absolute command of the Constitution that, 'in all criminal prosecutions, the accused . . . shall be heard by himself, or counsel, or both,' is more than a right secured to an accused. It is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State."

However, if the above isolated quotation from the Deeb case is considered in the light of the point dealt with, it is clear that said quotation is not authority for the petitioner's position that an accused in a non-capital felony case is entitled to have counsel appointed for him. The Florida Court gave the following reason for its said reference to Section 11 of the Bill of Rights of the Florida Constitution, to-wit:

> "The above reference to the organic rights of the accused to be heard by counsel, and to the duties of counsel in criminal prosecutions, is made

> preliminary to a consideration of an assignment of error on a charge of the court to the jury, after the state attorney and counsel for the accused had concluded their opening statements to the jury."

The charge to the jury which the Florida Supreme Court was passing upon dealt with the consideration to be given by the jury to the arguments of counsel, and, among other things, it told the jury that:

> "So the jury must be extremely cautious in considering the statements of counsel and not view it in the light of testimony in the case."

It is also true that in the Deeb case the Florida Supreme Court said that:

> "A command of the Constitution is that: 'In all criminal prosecutions, the accused . . . shall be heard by himself, or counsel, or both.' This organic provision necessarily gives to an accused on trial a wider latitude in testifying for himself than is accorded to mere witnesses under judicial or statutory rules of evidence. Such organic provision cannot legally be evaded; and the full benefit of the organic command should not be denied by a too strict application of judicial or statutory rules of evidence or of procedure. 12 C. J. 1205. When an accused testifies at his own trial for an alleged crime, he should be allowed to adduce pertinent facts that have direct and material relation to the merits of the defense he interposes. Otherwise the organic command which is the controlling law will not serve its intended purpose in the administration of justice by due course of law. This does not give to the accused an unlimited right to testify to irrelevant matters; but the command that an accused on trial 'shall be heard by himself, or counsel, or both,' certainly affords to an accused a right to be heard in response to appropriate questions by his counsel as to a matter that had been shown by State witnesses to have direct relation to the homicide for which the accused was being tried."

It is apparent that the said last quoted matter did no more than lay down the rule that the provision of Section 11 of the Declaration of Rights of the Constitution of Florida, that an accused shall be heard by himself, or counsel, or both, requires that an accused should be allowed to adduce pertinent facts that have direct and material relation to the merits of the defense he interposes. It is equally apparent that when the Florida Court made this pronouncement, it was not dealing with the question of whether or not Deeb had the right to have counsel appointed for him. As a matter of fact, the Florida Court's opinion in the Deeb case shows that Deeb was represented by counsel at his trial.

The petitioner cites Lowe v. State, 95 Fla. 81, 116 So. 240, but that case did not involve the question of whether an indigent accused in a non-capital case has the right to have the court appoint counsel for him. Lowe was charged with rape, a capital offense, and the trial court did appoint counsel for him, pursuant to the requirement of the statute that counsel be appointed for indigent defendants charged with capital offenses. The question in the Lowe case was as to whether a motion for continuance should have been granted because only four days elapsed from the appointment of counsel until the date of the trial, it being claimed that Lowe's counsel did not have sufficient time and opportunity to prepare for trial.

The petitioner cites Christie v. State, 94 Fla. 469, 114 So. 450. It is true that in that case the Florida Supreme Court said that a fair and impartial trial contemplates counsel to look after the defense of the accused, and that when less than this is given the spirit and purpose of the law is defeated. We point out, however, that such statement did not involve the question of whether an indigent accused in a non-capital felony case had the right to

require the court to appoint counsel for him. Said statement was made on the basis of the fact that, although Christie had employed counsel who were diligent in his behalf, the circumstances of the case showed that he was denied the fair benefit of having such counsel by being placed on trial before his counsel had adequate time to prepare and present his defense; and the reversal was based upon the denial of Christie's motion for continuance. The Florida Court was merely deciding that he had the right to adequate time for his counsel (furnished by him) to prepare his defense, which is a far cry from the question of whether a man is entitled to have counsel appointed for him.

There are other Florida cases not involving the point here under consideration in which general expressions have been made by the Florida Supreme Court in regard to denial of the right to counsel, such as:

May v. State, 89 Fla. 78, 103 So. 115, in which it was held that a trial court's action in restricting counsel to 20 minutes argument was in effect a deprival of the right to be heard by counsel (May furnished his own counsel);

Reed v. State, 94 Fla. 32, 113 So. 630 (a capital case), in which it was said that it was the duty of the trial court to appoint capable counsel for the accused (when Reed was tried in 1926, Section 8375, C.G.L., required the court to appoint counsel in capital cases where the defendant was insolvent);

Cooper v. State, 106 Fla. 254, 143 So. 217, which cited Section 11 of the Declaration of Rights in support of the ruling that a limitation of five minutes upon argument of counsel was a violation of the accused's right to be heard by counsel (Cooper furnished his own counsel);

House v. State, 130 Fla. 400, 177 So. 705, in which House claimed that he was denied an opportunity to get

in touch with counsel already employed by him (no question of the right to have the Court appoint counsel being involved), and in which the Florida Supreme Court cited Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, as holding that the right of one charged with crime to be represented by counsel of his own choice includes a fair opportunity to secure counsel of his own choice and that, if the accused is unable to employ counsel, the Court should *in certain cases* (the Powell case involved a capital crime) appoint counsel;

McCall v. State, 136 Fla. 343, 186 So. 667, (a capital case), wherein the Florida Supreme Court held that, in line with cited cases decided by the United States Supreme Court, counsel should be appointed in a capital case for an accused who is unable to employ counsel (as we have observed, Section 8375, C.G.L., and its successor, Section 909.21, Florida Statutes, 1941, both provided for the appointment of counsel for indigent defendants in capital cases);

Williams v. State, 143 Fla. 826, 197 So. 562 (a capital case), cited by petitioner, which went no further than to hold that a trial court has the inherent right (nothing said about duty) to appoint an attorney to represent an indigent defendant charged with a felony; and

Wood v. State, 155 Fla. 256, 19 So. 2d. 872, in which the Florida Supreme Court said, by way of obiter dictum, that a fair trial contemplates counsel. Neither in the Court's opinion nor in the briefs filed in said case is there even the slightest suggestion that the matter of counsel was involved. As a matter of fact, Wood was represented by able counsel throughout the proceedings in the trial court, and his right to use to the fullest extent the counsel which he furnished for himself was not brought into question.

The statements of the Florida Supreme Court in said May, Reed, Cooper, House, McCall, Williams and Wood cases should be construed in the light of the fact that they were made in connection with some point other than the one here under consideration.

We submit that every Florida case in point upholds our contention that an accused in a non-capital felony case has no right under Section 11 of the Florida Declaration of Rights to have the Court appoint counsel for him; that Section 909.21, Florida Statutes, 1941, providing for the appointment of counsel in capital cases, is the only requirement of Florida law as to the appointment of counsel; that Section 11 of the Florida Declaration of Rights imposes no additional duty in that regard.

SECOND QUESTION

UNDER THE CIRCUMSTANCES INVOLVED, THE TRIAL COURT'S REFUSAL TO APPOINT COUNSEL FOR THE PETITIONER DID NOT DEPRIVE HIM OF DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The information under which the petitioner was convicted in the Criminal Court of Record of Palm Beach County, Florida, on March 14, 1945, charged him with burglary, i.e., with breaking and entering the store building of a named person with intent to commit a felony, to-wit: grand larceny, by stealing, taking and carrying away property of another of the value of more than fifty dollars.

Since the information does not appear in the record, a copy thereof is annexed hereto for the information of the Court. (See appendix hereto). It was framed under

Section 810.02, Florida Statutes 1941 (set out in the appendix hereto).

The petitioner was eighteen years old and had an eighth grade education at the time of his conviction (Tr. 24).

In November, 1943, he had pleaded guilty to a burglary charge in Jackson County, Florida, and had served a portion of his sentence, from which he was on parole at the time he committed the burglary for which he was convicted in Palm Beach County on March 14, 1945 (Tr. 13, 30, 42, 51-52).

Although he was arrested on February 19, 1945 (Tr. 24) and was arraigned on February 20, 1945 (Tr. 36) and was present in court on March 6, 1945, when his case was set for trial (Tr. 36) on March 14, 1945 (Tr. 37), he made no request for the trial court to furnish him counsel until he was called for trial (Tr. 41) on March 14, 1945 (Tr. 26).

No complicated questions of law were involved in the case.

It was a charge with which the petitioner was not unfamiliar, as is shown by the above mentioned fact that he had previously pleaded guilty to committing the same kind of crime in Jackson County and had served time therefor in the State Prison.

Only simple questions of fact were involved, that is to say, (1) whether the petitioner broke into and entered the building mentioned in the information; (2) whether the building belonged to the owner alleged in the information; and (3) whether such breaking and entering was with the intent to steal property of the value of more than fifty dollars.

These questions of fact were so uncomplicated that no person could have failed to understand the matters

involved who, as was the case with the petitioner, had reached the age of eighteen years, had sufficient mental acumen to have completed the eighth grade in school, and had had the maturing experience gained by a previous conviction and imprisonment in the State Prison.

The petitioner's trial was most fairly and impartially conducted, and the trial judge kept the petitioner advised as to procedure.

During the trial, he was advised that he had the right to cross-examine the State's witnesses, and he did cross-examine them (Tr. 39-40). He took the stand as a witness in his own behalf and told his story, presenting his case very favorably (Tr. 39). He was informed of his right to address the jury, but declined to do so; neither did the County Solicitor address the jury (Tr. 40).

The case of Betts v. Brady, 316 U. S. 455, is authority for our position that, under the facts here involved, the refusal of the trial court to appoint counsel for the petitioner did not deny the petitioner due process of law. In an exhaustive opinion in Betts v. Brady, this Court came to the conclusion that the provisions in State Constitutions that a defendant should be "allowed" counsel or should have a right "to be heard by himself or his counsel," or that he might be heard by "either or both," are not aimed to compel the State to provide counsel for a defendant. This Court pointed out that in six of the states, including Florida, the State courts had decided that the State constitutional provisions did not require the appointment of counsel for indigent defendants. (See footnote 24). In affirming Betts v. Brady, this Court said:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want

> of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

There is not one scintilla of evidence to the effect that the petitioner in the case at bar was not given a fair trial, conducted in accordance with every principle of right and justice, and we submit that the petitioner has shown no denial of due process of law.

Certain cases decided by this Court subsequent to the decision in Betts v. Brady, supra, to-wit: Ex Parte Hawk, 321 U.S. 114; Williams v. Kaiser, 323 U.S. 471; Tompkins vs. Missouri, 323 U.S. 485; House vs. Mayo, 324 U.S. 42; White vs. Ragen, 324 U.S. 760; Rice vs. Olson, 324 U.S. 786; Hawk vs. Olson, 326 U.S. 271; Canizio vs. New York, 327 U.S. 82; Carter vs. Illinois,——— U.S.———, 91 L. Ed. 157 (Adv.) and De Meerleer vs. Michigan,——— U.S. ———, 91 L. Ed. 471 (Adv.); have led some to the mistaken idea that this Court has either overruled Betts v. Brady, or restricted it to such a point that it has no field of operation. To this we cannot agree. A careful analysis of said subsequent cases will reveal that the rule pronounced in Betts v. Brady has neither been overruled nor modified, and will reveal that said subsequent cases are not applicable to the case at bar.

Ex Parte Hawk, 321 U.S. 114, arose in Nebraska and involved a capital offense, viz., murder, instead of a non-capital offense such as was charged against the petitioner in the case at bar. This Court's holding as to counsel went no further than to say that Hawk was entitled to a hearing on his contention "that the state court forced him into trial for a capital offense, Neb. Comp. Stat. Section 28-401, with such expedition as to

deprive him of the effective asssistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment." It would therefore appear that he had either procured counsel for himself or that the trial court had furnished him counsel under the requirement of the Nebraska Statute (see Nebraska Rev. Stat. 1913, Section 9081; Rev. Stat. 1943, Crim. Proc., Art. 18, Section 29-1803), and that no question was involved as to whether it was the duty of the court to appoint counsel.

Williams v. Kaiser, 323 U.S. 471, arose in Missouri, and involved a capital offense, viz., robbery by means of a deadly weapon, instead of a non-capital offense such as was charged against the petitioner in the instant case. Moreover, the Missouri statutes have important distinctions between robbery in the first degree, robbery in the second degree, grand larceny and petit larceny. These statutes, said this Court, involved "technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available." Furthermore, Williams charged that his request for counsel was denied, which denial was in the teeth of the Missouri statute requiring the trial court to assign counsel to any person charged with felony, whether capital or non-capital, who was unable to employ one. (See Missouri Rev. Stat. 1939, Section 4003). As we have hereinabove shown, no law of Florida required the trial court to assign counsel for the petitioner in this cause and his case was in no way a complicated one and did not involve a capital crime.

The case of Tompkins v. Missouri, 323 U.S. 485, also involved a capital offense, viz., murder in the first degree. It also arose in Missouri, where one charged with murder in the first degree could be found guilty of that

offense, or of murder in the second degree, or of manslaughter. This Court pointed out that the punishments for these offenses were different and that "The differences between them are governed by rules of construction meaningful to those trained in the law but unknown to the average layman." Moreover, Missouri had a statute which required the trial court to assign counsel to any person charged with felony who was unable to employ one. (See Missouri Rev. Stat. 1939, Section 4003.) We note that this Court did not overrule Betts v. Brady, supra, despite counsel's insistence in the brief filed in behalf of Tompkins, reported in 89 L. Ed. 409, that the decision in Betts vs. Brady was wrong and should be overruled.

In the case of House v. Mayo, 324 U.S. 42, there was no question raised as to the denial of counsel but the question before the court was as to whether or not the Fourteenth Amendment to the Constitution was violated when an accused, who had already employed counsel, was denied by the trial court the right to consult with such previously retained counsel before being arraigned and required to plead.

White v. Ragen, 324 U.S. 760, arose in Illinois. White was charged in two indictments with obtaining money and goods "by means of the confidence game." The Illinois statute required the court to appoint counsel for indigent defendants in all criminal cases. (See footnote 28, Betts v. Brady, 316 U.S. 455, text 470, citing Ill. R. S. 1935, C. 38, Section 754). White's allegations showed that, although counsel was appointed, the purpose and intent of said statute was not effectuated, his allegations being that counsel so appointed never did confer with him until they came to court for trial; that said counsel refused to do anything for him unless he had some money; that he asked said counsel to have a witness

called in his behalf but counsel said that he didn't have time and told White to plead guilty because the court would not grant a continuance; that he requested the court to give him time to call a witness and to confer with his attorney, but the Judge told him to "keep still as his lawyer would do all the talking for him"; and that thereupon said counsel pleaded him guilty to the two indictments. No comparable situation existed in the case at bar, where there was no statute requiring the appointment of counsel and where the petitioner, instead of having a plea of guilty entered for him against his will, received a fair trial on the simple issues involved.

Rice v. Olson, 324 U.S. 786, involved the conviction of an Indian for burglary in the State of Nebraska, which had a statute requiring the court to assign counsel to every person indicted for an offense punishable by imprisonment in the penitentiary, if the prisoner did not have the ability to procure counsel. (See Nebraska Rev. Stat. 1913, Section 9081; Rev. Stat. 1943, Crim. Proc. Art. 18, Section 29-1803). Rice's allegations showed that the trial court failed to comply with this statute, his allegations being that the trial court failed to advise him of his right to counsel and to call witnesses, and that the conviction was void because the alleged crime was committed on an Indian Reservation which was exclusively within the federal jurisdiction. This Court said that there was involved a most intricate question of law concerning federal jurisdiction, which no layman was capable of understanding and deciding. In the case at bar, not only was there no statute requiring the appointment of counsel but there was no intricate question of law involved.

In Hawk v. Olson, 326 U.S. 271, Hawk was charged with and convicted of murder. (Shown by the Nebraska decision under review, reported in 16 N. W. 2d 181, to

be first degree murder.) Nebraska had a statute requiring the court to assign counsel to every person indicted for a felony punishable by imprisonment in the penitentiary, if the prisoner did not have the ability to procure counsel. (See Nebraska Rev. Stat. 1913, Section 9081; Rev. Stat. 1943, Crim. Proc., Art. 18, Section 29-1803). Hawk's allegations showed that the purpose and intent of this statute was defeated, his allegations being that at his trial he was denied the opportunity to examine the charge, consult counsel and prepare a defense, and that he had no advice of counsel prior to the calling of the jury. Moreover, this Court pointed out that in Nebraska homicide had degrees and there were difficulties in the application of the rules. No comparable factual or legal situation existed in the case at bar.

Canizio v. New York, 327 U.S. 82, involved a conviction for robbery in the first degree. It does not appear that, at the time of Canizio's conviction, he had previously been charged with, convicted of, and served time for robbery in the first degree or any other degree, or that he had had any previous experience with the criminal law. In the case at bar, the petitioner, charged with burglary, had previously been convicted of another burglary and had served a sentence in the State Prison therefor. Also, Canizio pleaded guilty, while the State of Florida proved the guilt of the petitioner in this cause in a fair trial. Moreover, under the New York statute (Section 308, N. Y. Code of Criminal Procedure), if a defendant appeared for arraignment without counsel, the Court was required to ask him if he desired the aid of counsel and, if he did desire counsel, the Court was required to assign counsel, while Florida has never had such a statute.

Carter v. Illinois, ——— U.S. ———, 91 L. Ed. 157 (Adv.), involved a conviction for murder, for which

capital punishment could be imposed in Illinois. The Illinois statute required the court to appoint counsel in all cases where the defendants were unable to procure counsel. (See footnote [illegible] Betts v. Brady, 316 U.S. 455, text 470, citing Ill. R. S. 1935, C. 38, paragraph 754). Carter's claim that he was denied counsel was not supported by the common law record before the court, but, even if his claim be established by proper procedure, it can be established only by showing that the Illinois trial court violated the purpose and intent of said statute. Florida has no such statute; nor was the petitioner in the instant case charged with a capital crime.

De Meerleer v. Michigan, —— U.S. ——, 91 L. Ed. 471 (Adv.), is in no respect akin to the case at bar. De Meerleer's conviction was for first degree murder, for which a sentence to life imprisonment was imposed. In the case at bar, the petitioner was convicted for burglary, which carried a maximum penalty of fifteen years imprisonment and for which the petitioner was sentenced to serve only five years. De Meerleer's arraignment, trial, conviction and sentence all occurred on the very same day the information was filed, while in the instant case the petitioner's arraignment was on February 20th; on March 6th his case was set for trial at a later date; and he was not tried until March 14th. The Michigan trial court did not explain to De Meerleer the consequences of the plea of guilty, and the record indicated considerable confusion in his mind at the time of arraignment as to the effect of such a plea, but no such circumstance was present in the case at bar, where the petitioner not only pleaded not guilty, but had previous experience with the same type of crime and was kept advised of his rights by the trial judge throughout the trial. In the De Meerleer case, no evidence was introduced in his behalf and none of the State's witnesses were cross examined, while in the case at bar the peti-

tioner not only cross examined the State's witnesses but also testified in his own behalf and makes no claim that he was deprived of the benefit of the testimony of any witness or that there was in existence any witness whose testimony would have helped his defense. Moreover, Michigan had a statute requiring the trial court to appoint counsel in all cases where defendants were unable to procure counsel. (See footnote 28, Betts v. Brady, 316 U.S. 455, text 470, citing Mich. Stat. Anno., Section 28-1253).

CONCLUSION

In conclusion, we submit that the record shows that the petitioner was given a fair and impartial trial; that all of his legal rights were scrupulously observed; that he was correctly advised of court procedure; that no question was involved that could not readily be understood by any layman, eighteen years of age, who possessed an eighth grade education and who had previously been convicted of the same kind of crime and had served time in the State Prison therefor; that the petitioner was perfectly capable of conducting his own defense; that the laws of Florida did not require the appointment of counsel for the petitioner; and that, under the circumstances here involved, the trial court's refusal to appoint counsel did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

.....

J. TOM WATSON
Attorney General of the State of Florida,
Attorney for Respondent.

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REEVES BOWEN

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SUMTER LEITNER
Assistant Attorneys General,
Of Counsel.

APPENDIX

Florida Statutes, 1941

909.21 *Appointment of counsel in capital cases*

In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable, for any reason, to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him, and apply for discharge by the court.

The compensation of counsel for the defendant, at the trial, shall not exceed one hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed one hundred dollars additional.

The following is a copy of the information under which the petitioner, Donald Wade, was tried and convicted in the Criminal Court of Record of Palm Beach County, Florida, (except that the County Solicitor's affidavit to such information is omitted) to-wit:

IN THE CRIMINAL COURT OF RECORD,
of the County of Palm Beach and State of Florida,

JANUARY Term, in the year of our Lord, One Thousand nine hundred and forty-FIVE

STATE OF FLORIDA VS. DONALD WADE, CLYDE MacVICAR AND DOUGLAS CHARLES ROYCE	INFORMATION FOR BREAKING AND ENTERING

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

W. E. ROEBUCK, County Solicitor for the County of Palm Beach, prosecuting for the State of Florida in the said County, under oath information makes that DONALD WADE, CLYDE MacVICAR and DOUGLAS CHARLES ROYCE of the County of Palm Beach and State of Florida, on the 19th day of February in the year of our Lord, one thousand nine hundred and forty-five in the County and State aforesaid, unlawfully did then and there break and enter the building of another, to-wit: the store building of Frank Deason, with intent then and there to commit a felony, to-wit: Grand Larceny, by then and there stealing, taking and carrying away property of another of the value of more than Fifty Dollars, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

W. E. ROEBUCK
County Solicitor,
Palm Beach County, Florida.

Florida Statutes, 1941

810.02 *Breaking and entering other buildings, ship or vessel*

Whoever breaks and enters any other building or any ship or vessel with intent to commit a felony, or after having entered with such intent

breaks such other building, ship or vessel, shall be punished by imprisonment in the state prison not exceeding fifteen years. If the offender breaks such building with the use of any high explosive mentioned in §810.01, or if he enters having with him, or having entered, take into his possession any such high explosive, he shall be punished by imprisonment in the state prison not exceeding twenty years.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 40

DONALD WADE,
PETITIONER,

v.

NATHAN MAYO, as State Prison Custodian of the State of Florida,
RESPONDENT.

SUPPLEMENTAL BRIEF OF RESPONDENT.

J. TOM WATSON
Attorney General of the State of Florida,
Attorney for Respondent.

REEVES BOWEN
SUMTER LEITNER
Assistant Attorneys General,
Of Counsel.

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the Circuit Court of Appeals, or this Court, any question as to the propriety of the exercise of jurisdiction by the District Court.

However, because of the Court's request, we now file this brief to present our views on the above stated problems.

FIRST PROBLEM

We find no exceptional circumstances disclosed by the record which would take this case out of the rule stated and applied in Ex Parte Hawk, 321 U. S. 114, as follows:

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, *including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari*, have been exhausted. Tinsley v. Anderson, 171 US 101, 104, 105, 43 L ed 91, 96, 18 S CT 805; Urquhart v. Brown, 205 US 179, 51 L ed 760, 27 S Ct 459; United States ex rel Kennedy v. Tyler, 269 US 13, 70 L ed 138, 46 S Ct 1; Mooney v. Holohan, supra (294 US 115, 79 L ed 795, 55 S Ct 340, 98 ALR 406); Ex parte Abernathy, No. _____, October 18, 1943 (320 US 219, ante, 1, 64 S Ct 13)." (Emphasis supplied).

In paragraph 6 of the petition for writ of habeas corpus filed in the District Court, the petitioner alleged that he obtained a writ of habeas corpus which was quashed by the Circuit Court of Palm Beach County, Florida. (Tr. 3).

Paragraph 7 of said petition alleged that the Attorney General filed a motion to dismiss the petitioner's appeal to the Supreme Court of Florida from the order quashing said writ (Tr. 3). A copy of said motion to dismiss

appeal was annexed to said petition as Exhibit B (Tr. 6-7), and, by apt reference, was made a part of said petition (Tr. 3).

Paragraph 8 of said petition alleged that the Supreme Court of Florida considered said motion to dismiss and made an order dismissing the appeal (Tr. 3). A copy of said order was attached to said petition as Exhibit C (Tr. 7-8), and, by apt reference, was made a part of said petition (Tr. 3).

Section 455, Title 28, U. S. C. A., says that:

> "§455. Allowance and Direction. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, *unless it appears from the petition itself that the party is not entitled thereto.* The writ shall be directed to the person in whose custody the party is detained." (Emphasis supplied).

It was the duty of the District Judge, when considering said petition, to treat it as if demurred to by the respondent, and to deny the petition if it appeared from the petition that the petitioner was not entitled to the writ. We quote the rule to that effect from Frank v. Mangum, 237 U. S. 309 (text 332), as follows:

> *"The District Court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff.* There is no doubt of the jurisdiction to issue the writ of habeas corpus. The question is as to the propriety of issuing it in the present case. *Under § 755, Rev. Stat., it was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it.* And see Ex parte Watkins, 3 Pet. 193, 201; Ex parte Milligan, 4 Wall. 2, 110; Ex parte Terry, 128 U. S. 289, 301." (Emphasis supplied).

We submit that the District Court should have treated the petition as though demurred to, and should have de-

nied it because it showed on its face that the petitioner was not entitled to relief from said Court.

We think that the petition and exhibits thereto put the District Judge on notice that the Supreme Court of Florida had dismissed the petitioner's appeal in the habeas corpus case for one of the following reasons: (1) Because the petitioner had not taken a direct appeal from his conviction, or (2) because, on the merits, the Florida Supreme Court considered that the petitioner was not entitled to avoid his conviction on account of the trial court's refusal of his request for the appointment of counsel. We will consider these reasons in reverse order.

The District Judge might well have construed the Florida Supreme Court's order dismissing appeal as being on the merits, that is to say, as being an adjudication that the trial court's refusal of the petitioner's request for the appointment of counsel did not entitle the petitioner to avoid his conviction.

This is so because the State's motion to dismiss the appeal, upon which the order of dismissal was predicated, pointed out that the Circuit Court's order quashing writ of habeas corpus was made "upon the authority of" decisions of the Florida Supreme Court cited in said order (Tr. 7); and because the Florida Supreme Court decisions cited in the Circuit Court's said order, viz., Watson v. State, 142 Fla. 218, 194 So. 640, and Johnson v. State, 148 Fla. 510, 4 So. 2d 671 (Tr. 5-6), held that no duty rested upon trial courts to appoint counsel for defendants in non-capital cases.

That the order dismissing appeal was subject to the construction that it was on the merits is borne out by a decision rendered after the District Judge had rendered judgment in favor of the petitioner, viz., John R. Johnson v. State, _____ Fla. _____, 28 So. 2d 585. In said

Johnson case, the Supreme Court of Florida spoke of the appeal of the petitioner, Donald Wade, which is here under consideration, in words as follows:

> "In May, 1945, Donald Wade presented his appeal to this Court from a judgment quashing a writ of habeas corpus theretofore issued by the Circuit Court of Palm Beach County on the petition of Donald Wade alleging that he had been unlawfully convicted of the commission of a felony in Palm Beach County in that at the time of his trial, conviction and sentence he was without aid of counsel and the court did not make an appointment of counsel, nor did petitioner waive his constitutional rights to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to go to trial without the aid of counsel. It was also alleged that he was ignorant and was also, because of lack of funds, unable to employ counsel; and that he requested the court to appoint counsel for him. He further alleged that he was not guilty of the offense charged.
>
> "Motion was made to dismiss the petition on the ground that the appeal was frivolous and on May 14, 1945, we entered an order granting the motion to dismiss on the ground stated.
>
> "We recognize the fact that in a great number of cases in other jurisdictions courts have construed provisions of respective State Constitutions similar to ours to guarantee to a defendant charged with a felony the benefit of counsel.
>
> "We are also cognizant of the rule in the Federal Courts but we are of the view that those decisions do not control in Florida."

If the District Judge considered the order dismissing appeal as being an adjudication on the merits, then it was the duty of said Judge to deny the petition because of the petitioner's failure to present the question to this

Court on certiorari or appeal from the Florida Supreme Court's order dismissing appeal. We quote from White v. Ragen, 324 U. S. 760, as follows:

> "Where the highest state court in which a decision could be had, considers and adjudicates the merits of a petition for habeas corpus, state remedies, including appellate review, are not exhausted so as to permit the filing of a petition for habeas corpus in a Federal district court, unless the Federal question involved is presented to this Court on certiorari or appeal from the state court decision. Ex parte Hawk, supra (321 US 116, 117, 88 L. Ed 574, 575, 64 S. Ct. 448)."

We think that the District Judge may also properly have construed the Florida Supreme Court's order dismissing said appeal as being based on the fact that the petitioner had not sought relief by direct appeal.

This is so because the motion to dismiss appeal set out that the appeal record revealed that the petitioner resorted to habeas corpus on March 16, 1945, one day after his conviction on March 15, 1945, and that it did not appear that he took an appeal or filed a motion for new trial (Tr. 6-7).

If the District Judge construed the order dismissing appeal as being based on the petitioner's failure to take a direct appeal from his conviction, it was said Judge's duty to deny the petition because it was apparent that the petitioner had not exhausted his remedies in the state courts.

It is clear that the petitioner could have raised the question of denial of counsel upon direct appeal from his conviction.

In Cutts v. State, 54 Fla. 21, 45 So. 491, one of the questions raised and decided by the Supreme Court of

Florida on direct appeal was as to whether the trial court erred in not appointing counsel for Cutts.

In Watson v. State, 142 Fla. 218, 194 So. 640, the Supreme Court of Florida decided on direct appeal the question of whether it was the trial court's duty to appoint counsel for Watson.

In Johnson v. State, 148 Fla. 510, 4 So. 2d 671, the Supreme Court of Florida decided on direct appeal the question of whether any duty rested on the trial court to appoint counsel for Johnson.

In House v. State, 130 Fla. 400, 177 So. 705, House made application to the Florida Supreme Court for leave to apply to the trial court for writ of error coram nobis. In said application he raised a similar constitutional question by alleging that he had been deprived of the right to avail himself of the services of counsel employed by him. The Florida Supreme Court said:

> "It thus appears that, *if the allegations of the petition are true, serious and reversible error was committed by the trial court, which could have been availed of on ordinary writ of error*, but which cannot be made the basis of a writ of error coram nobis, as it is not made to appear that the trial court (and petitioner as well) was without knowledge of the facts complained of when the pleas of guilty and judgments thereon were entered." (Emphasis supplied).

So, it is definitely established that direct appeal was a proper method of presenting to the Supreme Court of Florida the petitioner's contention that the trial court erred in refusing to appoint counsel for him.

The record in the case at bar is silent as to whether or not the petitioner's request for the appointment of counsel and the refusal of said request appeared of record in the Criminal Court of Record of Palm Beach County, Florida, in which Court the petitioner was convicted.

If the said trial court's record of the case did show such request and refusal, then the petitioner, upon taking an appeal at any time within ninety days after his conviction, could have taken said record to the Supreme Court of Florida as the basis for assigning such refusal as error. The ninety days allowed for appeal had not expired when the Supreme Court of Florida dismissed the appeal in the habeas corpus suit on May 14, 1945 (Tr. 7).

If the trial court's record did not show such request and refusal, the record could have been made to show the same by alleging the request and refusal in a motion for new trial, supported by affidavit or proof, and by obtaining the trial court's ruling that said allegation was true.

Motions for new trial may be filed as a matter of right within four days after verdict, and the trial court has the discretion to allow fifteen days. Section 920.02(3), Florida Statutes 1941.

The following portions of Section 920.05, Florida Statutes 1941, authorized the petitioner to raise in a motion for new trial the question of the trial court's refusal to appoint counsel, to-wit:

> "(1) The court shall grant a new trial if any of the following grounds are established, provided the substantial rights of the defendant have been prejudiced:
>
> * * * *
>
> "(f) That the court has erred in the decision of any matter of law arising during the course of the trial;
>
> * * * *
>
> "The court shall also grant a new trial when from any other cause not due to his own fault

> the defendant has not received a fair and impartial trial, or the sentence exceeds the penalty provided for by law."

Such an allegation in a motion for new trial would have raised a question of fact which the trial judge would have been authorized to decide, upon evidence presented by affidavit or otherwise, under Section 920.07(2), Florida Statutes 1941, which reads as follows:

> "(2) Where a motion for a new trial calls for the decision of any question of fact the court may hear evidence on such motion by affidavit or otherwise."

The Circuit Court's order quashing the writ of habeas corpus recited that *"This cause was heard,* after due notice, *upon* the motion of the State Attorney to quash the writ of habeas corpus, and *argument of counsel."* (Tr. 5). This showed that the petitioner was represented by counsel in the habeas corpus proceeding, which was commenced on March 16, 1945 (Tr. 6), well within the four days allowed to file motion for new trial as a matter of right.

Therefore, even if the trial court's record was silent as to the request for appointment of counsel and the denial of the request, the petitioner's counsel could easily have made said request and denial a part of the record for appeal purposes by alleging the same in a motion for new trial and, upon supporting proof, procuring a ruling establishing the truth of the allegation. Then, if the motion had been denied, the appellant would have had an unimpeachable record upon which to raise the question on appeal. And, if he had taken such a direct appeal, and had lost in the Florida Supreme Court, he could have applied to this Court for certiorari and would not have been entitled to invoke habeas corpus relief in the Federal Court without doing so. White v. Ragen, 324 U. S. 760.

We recognize that, *in certain types of cases*, this Court has held that the failure to take a direct appeal from a conviction did not bar a resort to habeas corpus.

For example, in Johnson v. Zerbst, 304 U. S. 458, where the conviction was in the Federal Court and where the question of the right to have counsel appointed arose under the Sixth Amendment, no appeal was taken from the conviction within the time allowed by law. This Court ruled that Johnson was entitled to resort to habeas corpus in the Federal Court, despite his failure to perfect a direct appeal, but, in so ruling, this Court said:

> "Petitioner, convicted and sentenced without the assistance of Counsel, contends that he was ignorant of his right to Counsel, and incapable of preserving his legal and constitutional rights during trial. *Urging that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal. If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by habeas corpus.*" (Emphasis supplied).

It thus appears that this Court took cognizance of Johnson's inability to appeal because of lack of counsel and ignorance of appellate proceedings. No such situation excuses the failure of the petitioner in the instant case to take a direct appeal, because he had counsel in ample time to have presented his point by direct appeal from his conviction.

For further examlpe, in Smith v. O'Grady, 312 U. S. 329, although Smith had not appealed from his original conviction, this failure was not considered a bar to subsequent habeas corpus proceedings in the State Courts of Nebraska. However, as was pointed out in this Court's opinion, Smith had an unanswerably good reason for not taking a direct appeal, viz.:

> "Because of his ignorance of his rights, and because of the trial court's failure to appoint, and his inability to obtain, counsel, the original sentence was not appealed."

The petitioner in the case at bar had no such excuse for not appealing from his conviction, because he had counsel within one day after his conviction and could have appealed had he so desired.

For further example, in Williams v. Kaiser, 323 U. S. 471, this Court considered that Williams' failure to appeal from his conviction was not a bar to raising in a subsequent habeas corpus proceeding in the state courts of Missouri the question of denial of counsel. In arriving at that conclusion, this Court said:

> "Missouri, however, does contend that the denial of counsel could have been challenged by petitioner by an appeal, that no appeal was taken, and that no extraordinary circumstances are shown which excuse that failure. Heretofore we have not considered a failure to appeal an adequate defense to habeas corpus *in this type of case*. Smith v. O'Grady, 312 U. S. 329, 85 L. Ed 859, 61 S. Ct. 572, supra. Under these circumstances the failure to appeal only emphasizes the need of counsel. If an appeal were made such a requirement, the denial of counsel would in and of itself defeat the very right which the Constitution sought to protect." (Emphasis supplied).

We infer from the above quoted statement of this Court that Williams was excused for his failure to take

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1947.

Donald Wade, Petitioner, *v.* Nathan Mayo, as State Prison Custodian of the State of Florida.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 14, 1948.]

Mr. Justice Murphy delivered the opinion of the Court.

This case centers on two issues: (1) whether it was proper for a federal district court to entertain a *habeas corpus* petition filed by a state prisoner who, having secured a ruling from the highest state court on his federal constitutional claim, had failed to seek a writ of certiorari in this Court; (2) whether the federal district court correctly held that the prisoner had been deprived of his constitutional right to counsel at the trial for a non-capital state offense.

On February 19, 1945, petitioner Wade was arrested in Palm Beach County, Florida, upon the charge of breaking and entering. He was held in jail until brought to trial before a jury on March 14, 1945, in the Criminal Court of Record of Palm Beach County. Just before the trial started, he asked the trial judge to appoint counsel to represent him, claiming that it was financially impossible to employ one himself. The judge refused the request and the trial proceeded. The jury returned a verdict of guilty on the same day and Wade was immediately sentenced to serve five years in the state penitentiary.

Wade then obtained the aid of counsel. On March 16, two days after the trial and conviction, this counsel filed

a petition for a writ of *habeas corpus* in the Circuit Court of Palm Beach County. The petition claimed that the refusal of the judge to appoint counsel for Wade at the trial was a denial of the due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The writ was issued, a hearing was had, and the Circuit Court thereupon granted the motion of the state's attorney to quash the writ. This action was taken on the authority of two decisions of the Supreme Court of Florida holding that under Florida law a trial court has no duty to appoint counsel to represent the accused in a non-capital case. *Watson* v. *State*, 142 Fla. 218, 194 So. 640; *Johnson* v. *State*, 148 Fla. 510, 4 So. 2d 671.

Wade's counsel appealed the decision of the Circuit Court to the Supreme Court of Florida. In the latter court, the state's Attorney General filed a motion to dismiss the appeal as frivolous. Two points were emphasized in this motion: (1) Wade had not appealed from his conviction or even filed a motion for a new trial; (2) the Circuit Court had quashed the *habeas corpus* writ on the authority of the two cases cited in its order. The Supreme Court, upon consideration of this motion, granted the motion and dismissed the appeal. No written opinion was filed and no indication was given whether the appeal was dismissed for one or both of the reasons advanced by the Attorney General. The date of this action was May 14, 1945. No attempt was made to secure a writ of certiorari from this Court.

Nearly a year later, on May 8, 1946, a petition for a writ of *habeas corpus* was filed in the United States District Court for the Southern District of Florida. This petition alleged that the refusal to appoint counsel for Wade at the trial deprived him of his constitutional right to due process of law. And the petition further stated that this point had not been raised by way of appeal

from the conviction because of the belief that the *Watson* and *Johnson* cases made it plain that the Supreme Court of Florida "has no power of reversal of a conviction because defendants were not represented by counsel, and for that reason failed to obtain a fair trial, except in capital cases, and this case is not a capital case." Such was the reason given for the belief that an appeal would have been useless and of no avail. But the petition pointed out that in order to exhaust all his remedies in the state courts before applying to a federal court, Wade had pursued a writ of *habeas corpus* all the way through the Florida courts.

The District Court granted the writ and a hearing was held on May 17, 1946. Both Wade and the trial judge testified as to the events surrounding the refusal to appoint counsel. After hearing this testimony and the argument of counsel, the District Court concluded that under the circumstances the denial of Wade's request was contrary to the due process guaranteed by the Fourteenth Amendment, thereby rendering void the judgment and commitment under which Wade was held. But the Fifth Circuit Court of Appeals reversed, holding that the Fourteenth Amendment did not require the appointment of counsel in non-capital state cases unless the state law so required. 158 F. 2d 614.

We then granted certiorari. After the case had been submitted to us on briefs, we ordered the case restored to the docket for reargument on two points: "(1) the propriety of the exercise of jurisdiction by the District Court in this case when it appears of record, in the state's motion for dismissal of the appeal on *habeas corpus*, that petitioner had not availed himself of the remedy of appeal from his conviction, apparently open after trial though now barred by limitation . . . (2) whether the failure of Florida to make this objection in this proceeding affects the above problem."

In our view, it was proper for the District Court to entertain Wade's petition for a writ of *habeas corpus* and to proceed to a determination of the merits of Wade's constitutional claim. The crucial point is that Wade has exhausted one of the two alternative routes open in the Florida courts for securing an answer to his constitutional objection. It now appears that a defendant who is denied counsel in a non-capital case in Florida may attack the constitutionality of such treatment either by the direct method of an appeal from the conviction or by the collateral method of *habeas corpus*. Since Wade chose the latter alternative and pursued it through to the Supreme Court of Florida, he has done all that could be done to secure a determination of his claim by the Florida courts. The fact that he might have appealed his conviction and made the same claim and received the same answer does not detract from the completeness with which Florida has disposed of his claim on *habeas corpus*. The exhaustion of but one of several available alternatives is all that is necessary.

At the time the Supreme Court of Florida dismissed Wade's *habeas corpus* appeal, however, the propriety of the *habeas corpus* method of raising the right of counsel issue was anything but clear. The failure of that court to specify the reason for the dismissal made it possible to construe the action as a holding that a direct appeal from the conviction was the only remedy available to Wade. The Attorney General's motion to dismiss the *habeas corpus* appeal seemed to make that point and the Supreme Court might have adopted it as the sole ground of dismissal. Had that been the situation, the case before us would be in an entirely different posture. Wade would then be in the position of seeking relief in a federal court after having chosen to forego the opportunity to secure recognition of his claim by the exclusive mode designated by Florida.

But the doubts as to the availability of *habeas corpus* in Florida for the purpose at hand have been dispelled by the subsequent decision of the Supreme Court of Florida in *Johnson* v. *Mayo*, 158 Fla. 264, 28 So. 2d 585. That case was a *habeas corpus* proceeding in which the Florida court proceeded to pass upon the merits of a claim identical with that raised by Wade. In so doing, the court relied upon the disposition of Wade's *habeas corpus* appeal, stating that it had been dismissed as frivolous. As the *Johnson* case makes clear, Wade's appeal was considered frivolous because the right to counsel in a non-capital case is counter to the settled law of Florida. Reference was made in the *Johnson* decision to the contrary decisions in other states and to "the rule in the Federal Courts but we are of the view that those decisions do not control in Florida." 158 Fla. at 266; 28 So. 2d at 586.

Thus the Supreme Court of Florida announced unambiguously less than a year and a half after its dismissal of Wade's appeal that its action had been grounded on the merits of the constitutional issue tendered by Wade, rather than on a holding that a direct appeal was the only way to raise that issue. It is not for us to contradict this construction by the Florida court and to attribute the dismissal of Wade's appeal to a state ground of procedure which is negatived by both the decision and the reasoning in the later *Johnson* case.

The only real problem in this case concerning the propriety of the District Court entertaining Wade's petition relates to the effect of his failure to seek a writ of certiorari from this Court following the action of the Supreme Court of Florida on his *habeas corpus* appeal. It has been said that "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by

appeal or writ of certiorari, have been exhausted." *Ex parte Hawk*, 321 U. S. 114, 116–117. The problem is to reexamine this statement in the light of the facts of this case.

The requirement that state remedies be exhausted before relief is sought in the federal courts is grounded primarily upon the respect which federal courts have for the state judicial processes and upon the administrative necessities of the federal judiciary. State courts are duty bound to give full effect to federal constitutional rights and it cannot be assumed that they will be derelict in their duty. Only after state remedies have been exhausted without the federal claim having been vindicated may federal courts properly intervene. Indeed, any other rule would visit upon the federal courts an impossible burden, forcing them to supervise the countless state criminal proceedings in which deprivations of federal constitutional rights are alleged.

But the reasons for this exhaustion principle cease after the highest state court has rendered a decision on the merits of the federal constitutional claim. The state procedure has then ended and there is no longer any danger of a collision between federal and state authority. The problem shifts from the consummation of state remedies to the nature and extent of the federal review of the constitutional issue. The exertion of such review at this point, however, is not in any real sense a part of the state procedure. It is an invocation of federal authority growing out of the supremacy of the Federal Constitution and the necessity of giving effect to that supremacy if the state processes have failed to do so.

After state procedure has been exhausted, the concern is with the appropriate federal forum in which to pursue further the constitutional claim. The choice lies between applying directly to this Court for review of the constitutional issue by certiorari or instituting an original *habeas*

corpus proceeding in a federal district court. Considerations of prompt and orderly procedure in the federal courts will often dictate that direct review be sought first in this Court. And where a prisoner has neglected to seek that review, such failure may be a relevant consideration for a district court in determining whether to entertain a subsequent *habeas corpus* petition.

But the factors which make it desirable to present the constitutional issue directly and initially to this Court do not justify a hard and fast rule to that effect, especially in view of the volume of this Court's business. Writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits. The constitutional issue may thus have no bearing upon the denial of the writ. Where it is apparent or even possible that such would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a *habeas corpus* application in a district court. Good judicial administration is not furthered by insistence on futile procedure.

Moreover, the flexible nature of the writ of *habeas corpus* counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation on the writ. *Habeas corpus* is presently available for use by a district court within its recognized jurisdiction whenever necessary to prevent an unjust and illegal deprivation of human liberty. Cf. *Price* v. *Johnston*, 334 U. S. — (slip opinion, p. 15). Where the matter is otherwise within the jurisdiction of the district court, it is within the discretion of that court to weigh the failure to seek certiorari against the miscarriage of justice that might result from a failure to grant relief. In short, we refuse to codify the failure to invoke the discretionary certiorari powers of this Court into an absolute denial

of the district court's power to entertain a *habeas corpus* application. The prevention of undue restraints on liberty is more important than mechanical and unrealistic administration of the federal courts.

Fear has sometimes been expressed that the exercise of the district court's power to entertain *habeas corpus* petitions under these circumstances might give rise to frequent instances of a single federal judge upsetting the judgment of a state court, often the highest court of the state. But to restrict the writ of *habeas corpus* for such reason is to limit it on the basis of a discredited fear. Experience has demonstrated that district court judges have used this power sparingly and that only in a negligible number of instances have convictions sustained by state courts been reversed. Statistics compiled by the Administrative Office of the United States Courts show that during the fiscal years of 1943, 1944 and 1945 there was an average of 451 *habeas corpus* petitions filed each year in federal district courts by prisoners serving state court sentences; of these petitions, an average of but 6 per year resulted in a reversal of the conviction and a release of the prisoner. The releases thus constituted only 1.3% of the total petitions filed. In light of such figures, it cannot be said that federal judges have lightly exercised their power to release prisoners held under the authority of a state. See *Ex parte Royall*, 117 U. S. 241, 253.

In the instant case, we believe that it was well within the discretion of the District Court to consider Wade's petition for a writ of *habeas corpus*. The Florida courts had given a full and conclusive answer to his claim that he had been denied his constitutional right to counsel. No other remedies were available in Florida. True, he did not seek certiorari following the dismissal of his *habeas corpus* appeal by the Supreme Court of Florida. But at the time of that dismissal, it was extremely doubt-

ful, to say the least, whether the constitutional issue had really been decided. That doubt was such as to make it reasonably certain that this Court would have denied certiorari on the theory that an adequate state ground appeared to underlie the judgment. His failure to make this futile attempt to secure certiorari accordingly should not prejudice his subsequent petition for *habeas corpus* in the District Court. Otherwise he would be left completely remediless, having been unable to secure relief from the Florida courts and being barred from invoking the aid of the federal courts.

As to the merits of Wade's constitutional claim, the District Court made the following findings after a hearing at which Wade and the trial judge gave testimony:

"The Court has heard the evidence of the respective parties and the argument of their counsel. It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel. . . . The denial of petitioner's request in the circumstances here involved constitutes a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held. . . ."

As the Circuit Court of Appeals pointed out, the evidence at the hearing before the District Court further showed that during the progress of the trial Wade (a) was advised by the trial judge of his right to challenge jurors

and excuse as many as six without reason, a right which he did not exercise; (b) was afforded an opportunity, which he accepted, to cross-examine state witnesses; (c) took the stand and testified in his own behalf; and (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney.

We are not disposed to disagree with the findings and conclusion of the District Court. Its determination was a purely factual one to the effect that Wade was an inexperienced youth incapable of adequately representing himself even in a trial which apparently involved no complicated legal questions. This is a judgment which is peculiarly within the province of the trier of facts, based upon personal observation of Wade. And we do not find that the District Court's determination was clearly erroneous.

There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.

The Circuit Court of Appeals was therefore in error in reversing the District Court's judgment. It was also in error in assuming that the failure to appoint counsel in a non-capital case in a state court is a denial of due process under the Fourteenth Amendment only if the law of the state requires such an appointment. To the extent that there is a constitutional right to counsel in this type of case it stems directly from the Fourteenth Amendment and not from state statutes. *Betts* v. *Brady*, 316 U. S. 455, 473.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1947.

Donald Wade, Petitioner, v. Nathan Mayo, as State Prison Custodian of the State of Florida.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 14, 1948.]

Mr. Justice Reed, dissenting.

Donald Wade was brought to trial March 14, 1945, in the Criminal Court of Record of Palm Beach County, Florida. On the same day, after proceedings before the presiding judge in which Wade represented himself, he was convicted of the crime of breaking and entering, and sentenced to five years' imprisonment. Wade did not appeal his conviction, but on March 16, 1945, having obtained the aid of counsel, he brought a petition for a writ of habeas corpus in the Circuit Court of Palm Beach County; on March 22, 1945, that court quashed the writ; an appeal from the order quashing the writ was taken to the Supreme Court of Florida and on May 14, 1945, that court dismissed the appeal without stating whether it disposed of the case on the merits or upon a procedural ground.[1] However, in a later case, *Johnson* v. *Mayo*, 158 Fla. 264, the Florida Supreme Court indicated that its ruling in the *Wade* case had been upon the merits. For the purposes of this opinion, I assume that this decision was upon the merits. Wade failed to bring a writ of certiorari to this Court to review the action of the state Supreme Court. On May 8, 1946, a petition for a writ of habeas corpus was filed in the federal Dis-

[1] *Wade* v. *Kirk*, 155 Fla. 906.

trict Court for the Southern District of Florida. The writ was granted and a hearing set for May 17, 1946. At the hearing the court examined Wade's claim that he had been deprived of his constitutional rights by the failure of Florida to furnish him with counsel. It concluded that Wade had been deprived of those rights and ordered that he be released from the custody of the respondent, Mayo, and be remanded to the custody of the sheriff of Palm Beach County, Florida, to be held for any further proceedings which the state should take. On appeal, the Circuit Court of Appeals for the Fifth Circuit reversed the lower court. It held that the Constitution does not require that a state furnish counsel to one in the position of Wade. It based this conclusion, we think, from examination of its opinion, on *Betts* v. *Brady*, 316 U. S. 455, not on any ruling that state law determines the necessity for the appointment of counsel in state cases in all non-capital prosecutions.[2] We granted certiorari, 331 U. S. 801; the case was submitted to us; on November 10, 1947, we ordered the case restored to the docket for reargument, directing that counsel discuss these questions: "(1) the propriety of the exercise of jurisdiction by the District Court in this case when it appears of record, in the state's motion for dismissal of the appeal on habeas corpus, that petitioner had not availed himself of the remedy of appeal from his conviction, apparently open after trial though now barred by limitation . . . ; (2) whether the failure of Florida to make this objection in this proceeding affects the above problem."

I.

The first question in this case is whether Wade's failure to bring a writ of certiorari to this Court from the judg-

[2] *Mayo* v. *Wade*, 158 F. 2d 614.

ment of the Florida Supreme Court in his state habeas corpus proceeding should affect his effort to obtain release through a federal writ of habeas corpus. Or, to rephrase the problem, should certiorari to this Court be considered a part of the state remedy for purposes of the well-recognized doctrine of exhaustion of state remedies? *Mooney* v. *Holohan*, 294 U. S. 103.

This inquiry may be started by considering *Ex parte Hawk*, 321 U. S. 114. The unanimous opinion in this case was handed down January 31, 1944. Hawk had made a motion for leave to file a writ of habeas corpus in this Court. His application was denied on the ground that he had failed to exhaust the state remedies available to him. The opinion in Hawk's case, however, has been understood by this and other courts as having been designed to give direction for procedure to advise federal courts in their consideration of applications for habeas corpus brought by a person confined under a state criminal conviction.[3] One of the rules which this Court prescribed governs the issue now under consideration.

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this

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[3] This Court has, in a number of instances, through its Clerk, distributed this opinion to state prisoners seeking habeas corpus relief in federal courts.

Potter v. *Dowd*, 146 F. 2d 244, 248: "The Hawk decision is the latest of the Supreme Court on the subject. It was no doubt intended to enlighten the Federal inferior courts so that the rather difficult road which they must travel will have fewer obstructions. Also, the convict who believes he has been denied rights guaranteed him by the Federal Constitution will find the proper judicial haven he is seeking."

Court by appeal or writ of certiorari, have been exhausted. *Tinsley* v. *Anderson*, 171 U. S. 101, 104–5; *Urquhart* v. *Brown*, 205 U. S. 179; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13; *Mooney* v. *Holohan*, *supra*, 115; *Ex parte Abernathy*, 320 U. S. 219." [4]

After a person, protected by the presumption of innocence, has been convicted by a state trial court and his conviction has been subjected either to direct or collateral attacks in the state courts,[5] wise administration commands that this Court be asked, by appeal or certiorari, to pass upon the federal constitutional questions presented.[6] It is only by such a procedure that the validity of state criminal conviction can be expeditiously and finally adjudicated.[7]

The lower federal courts have consistently followed this rule of practice. Some district judges have used form letters which they sent to convicts confined in state prisons who sought habeas corpus.[8] In *Gordon* v. *Scudder*, 163

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[4] *Ex parte Hawk*, *supra*, at 116–17.

[5] If a state judgment is based upon an adequate state ground, a failure to request review by this Court does not prejudice the prisoner. *White* v. *Ragen*, 324 U. S. 760, 767; *House* v. *Mayo*, 324 U. S. 42, 48.

[6] At pp. 8–9, *infra*, I comment upon the delicate nature of the federal habeas corpus jurisdiction over state convictions. Those observations are relevant here.

[7] See pp. 11–12, *infra*.

[8] An example of such a letter appears in the record in *Ex parte Hanley*, 322 U. S. 708:

"Your petition for writ of habeas corpus has been received and examined. From such examination, it appears that, if filed, your petition would have to be dismissed for the reason that it does not appear therefrom that you have exhausted your remedies in the Supreme Court of the United States, in accordance with the sug-

F. 2d 518, the Circuit Court of Appeals for the Ninth Circuit applied the rule to a state habeas corpus proceeding in which the habeas corpus had been denied without opinion. All of the circuit courts which have considered this rule have approved it.[9]

Today the Court both limits and confuses the doctrine of exhaustion of state remedies so clearly expounded in *Ex parte Hawk, supra*. Certainty in habeas corpus procedure for review of state convictions is essential so that the applicant may know the way to test the constitutionality of his conviction and so that the public and its judicial system may be spared undue expense and interference from a succession of petitions that cannot be considered on the merits because of procedural defects. The

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gestion contained in a recent opinion of the Supreme Court of the United States in the case of *Ex parte Henry Hawk* (filed January 31, 1944), wherein the court said:

"'Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts *and in this court by appeal or writ of certiorari*, have been exhausted.'

Accordingly, your petition has not been filed and is returned herewith. If, however, you desire to make a record in this court, you may return the petition (referring to this letter) with the request that it be filed, and it will be filed in the office of the clerk of this court.

"I do not wish to be understood as expressing any opinion on the merits of your case."

[9] See *Lyon* v. *Harkness*, 151 F. 2d 731, 733 (C. C. A. 1st); *Monsky* v. *Warden of Clinton State Prison*, 163 F. 2d 978, 979 (C. C. A. 2d); *Stonebreaker* v. *Smyth*, 163 F. 2d 498, 501–502 (C. C. A. 4th); *Nusser* v. *Aderhold*, 164 F. 2d 127 (C. C. A. 5th); *Makowski* v. *Benson*, 158 F. 2d 158 (C. C. A. 6th); *Ross* v. *Nierstheimer*, 159 F. 2d 994 (C. C. A. 7th); *Guy* v. *Utecht*, 144 F. 2d 913, 915 (C. C. A. 8th); *Gordon* v. *Scudder*, *supra* (C. C. A. 9th); *Hersog* v. *Colpoys*, 143 F. 2d 137, 138 (App. D. C.).

serious and difficult problems of habeas corpus procedure in the federal courts cannot be solved by rules which have as their very core vagueness and uncertainty.[10] I conclude that certiorari should be considered a part of the state procedure for purposes of habeas corpus.

II.

The next issue is this. Can Wade, having failed to use a state remedy once available [11]—appeal—and having failed to take a writ of certiorari to this Court from the denial of his state habeas corpus, with no conditions existing or claimed that restricted his ability to proceed in the regular course in the handling of his case after verdict, obtain relief in a federal habeas corpus proceeding for an alleged deprivation of his constitutional right to counsel when it appears that no state remedy in which relief can be obtained is now available? [12]

The federal courts have the power to discharge upon a writ of habeas corpus "a prisoner . . . in custody in violation of the Constitution . . . of the United

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[10] Cf. dissent in *Maggio* v. *Zeitz*, 333 U. S. 56, 81.

[11] "An appeal . . . may be taken only within ninety days after the judgment or sentence appealed from is entered, except that an appeal from both judgment and sentence may be taken within ninety days after the sentence is entered." 24 Fla. Stat. Ann. § 924.09.

[12] Florida provides two devices for collateral attack upon criminal convictions: habeas corpus and coram nobis. Wade has tried habeas corpus and failed. *Wade* v. *Kirk*, 155 Fla. 906. Coram nobis is available only to bring to the attention of the court specific facts, existing at the time of the trial, but not shown by the record and not known by the court or by the defendant or his counsel at the time of the trial. *Lamb* v. *State*, 91 Fla. 396. See *House* v. *State*, 130 Fla. 400; cf. *Hysler* v. *Florida*, 315 U. S. 411, 415–16. The facts upon which Wade seeks relief were known, during the course of the trial, both to himself and to the trial judge.

States . . . ."[13] This Court held in *Frank* v. *Mangum*, that this writ is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution . . . ."[14] The dissent in the *Frank* case agreed with the Court's theory of the availability of habeas corpus, saying at p. 346: "But *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." As Wade alleged a deprivation of his constitutional rights, the district court had jurisdiction to entertain the petition for the writ of habeas corpus.

Habeas corpus is, however, a discretionary writ.[15] Thus, the question presented is this: Was it proper for the district court to exercise its jurisdiction when it appeared of record that Wade had not availed himself of the remedy of appeal, open after trial though now barred by limi-

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[13] 28 U. S. C. §§ 451–53. Under the Judiciary Act of 1789, the writ could not issue if the prisoner was held under final process based upon a judgment of a court of competent jurisdiction. *Ex parte Watkins*, 3 Pet. 193. Congress expanded the power of the federal courts to issue the writ in situations in which the federal Constitution has been violated by the Act of February 5, 1867. 14 Stat. 385, ch. 28; see *Hawk* v. *Olson*, 326 U. S. 271, 274–75; *Frank* v. *Mangum*, 237 U. S. 309, 330–32.

[14] *Frank* v. *Mangum*, 237 U. S. 309, 331.

[15] *Ex parte Royall*, 117 U. S. 241, 250 *et seq.*; *In re Wood*, 140 U. S. 278, 290; *Cook* v. *Hart*, 146 U. S. 183, 195; *In re Frederich*, 149 U. S. 70, 75; *New York* v. *Eno*, 155 U. S. 89; *In re Lincoln*, 202 U. S. 178, 181; *Urquhart* v. *Brown*, 205 U. S. 179; *Salinger* v. *Loisel*, 265 U. S. 224, 231; *Goto* v. *Lane*, 265 U. S. 393, 403; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17; *Ex parte Hawk*, 321 U. S. 114.

tation and had failed to exhaust, by writ of certiorari, the state remedy of habeas corpus? An answer to this problem can best be derived from a consideration of the nature and function of habeas corpus in a federal system of government, the relevant precedents and analogies drawn from the decided habeas corpus cases, and the resolution of similar questions in related fields.

State judicial systems are designed to provide places of trial for offenders against the criminal laws of their respective states. State courts equally with federal courts administer justice under the authority and limitations of the Constitution of the United States, the supreme law of the land, binding the judges in every state "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[16] Thus, whenever a prisoner brings a petition for a writ of habeas corpus in the federal courts challenging collaterally a conviction in the state courts and asking release from state custody, serious questions of the relation between the federal and state judicial structures are raised. "It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under indictment in a state court and subject to its laws may, by a decision of a single judge of a Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom . . . ."[17] Respect for the theory and practice of our dual system of government requires that federal courts intervene by habeas corpus in state criminal prosecutions only in exceptional circumstances. Their duty compels them to act where the state fails to provide a remedy for violations of constitutional rights but due regard for a state's system of justice admonishes federal

[16] Const., Art. VI; *Robb* v. *Connolly*, 111 U. S. 624, 637.
[17] *Baker* v. *Grice*, 169 U. S. 284, 291.

courts to be chary of allowing the extraordinary writ of habeas corpus where the accused, without excuse, has not exhausted the remedies offered by the State to redress violations of federal constitutional rights.[18]

The desirability of discretionary limitation of the habeas corpus power of federal courts in respect to state criminal prosecutions which inheres in the dual sovereignties of the federal system is re-enforced by considerations of practical administration: (1) it is not to be assumed that state courts deliberately deny to the individual his rights under the Federal Constitution; (2) the normal paths of review—appeal and petition for certiorari—are open to correct federal constitutional errors in state criminal proceedings; (3) extravagant exercise of federal jurisdiction would furnish another technique of delay in a criminal system which often permits long periods of time to elapse between sentencing and execution of sentence.

Because of the above reasons, the federal courts exercise their habeas corpus jurisdiction where an individual is in the custody of a state in limited types of situations. For example: (1) where all state remedies have been exhausted; (2) where the state remedy is seriously inadequate; [19] and (3) where a state attempts to interfere improperly with the Federal Government.

The third class of cases represents the largest group of situations in which federal courts exercise habeas corpus jurisdiction without the exhaustion of state remedies. The cases of this type which have come before this Court are examples of the use of habeas corpus to prevent state interference with the administration of a branch of the

[18] See *Frank* v. *Mangum*, 237 U. S. 309, 329; *Ex parte Royall*, 117 U. S. 241, 247–54; *Mooney* v. *Holohan*, *supra*.

[19] See *Ex parte Hawk*; 321 U. S. 114, 118.

Federal Government,[20] or with a federal agency,[21] or with treaty rights of the United States.[22]

The second class is represented in this Court by only one case, *Moore* v. *Dempsey*, 261 U. S. 86. There exhaustion of state remedies was not required.[23] "We assume in accordance with that case [*Frank* v. *Mangum*, 237 U. S. 309, 335] that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. . . . But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrongs, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."[24] That *Moore's* case is unique, emphasizes its unusual nature; this Court has not again been compelled to resort to this extreme procedure to protect constitutional rights.

The greatest number of habeas corpus cases in the federal courts fall into class one. In *Ex parte Hawk*, *supra*, we stated the principle which governs these cases: "Ordinarily an application for habeas corpus by one detained under a state judgment of conviction for crime will be entertained by a federal court only after

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[20] *In re Neagle*, 135 U. S. 1; *Hunter* v. *Wood*, 209 U. S. 205 (impairment of the functions of the federal courts); *In re Loney*, 134 U. S. 372 (impairment of the functions of the legislative and judicial branches of the Federal Government).

[21] *Boske* v. *Comingore*, 177 U. S. 459; *Ohio* v. *Thomas*, 173 U. S. 276.

[22] *Wildenhus's Case*, 120 U. S. 1.

[23] See *State* v. *Martineau*, 149 Ark. 237.

[24] *Moore* v. *Dempsey*, *supra*, at 91.

all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted . . ."[25] Litigation of this category offers the best example of the general principle of federal-habeas-corpus restraint. The insistence that state remedies be exhausted is but a concise statement of the proposition that state courts must, in all but the most exceptional cases, be the forums in which all the problems incident to a state criminal prosecution are to be answered.

Where a state offers an adequate remedy for the correction of errors in criminal trials, that remedy must be followed. Where there is a denial of constitutional rights by the highest court of a state, a remedy exists by direct review in this Court.[26] An accused should not be permitted to reserve grounds for a habeas corpus petition in federal courts which would have furnished a basis for a review in regular course in the state court; not even when those grounds are that the accused was denied a constitutional right by a state court subject to reversal by a higher state court.[27] To permit such trifling with state criminal law would disrupt its efficient administration. The federal court's refusal of consideration depends on the rule that the federal courts should not utilize habeas corpus to take the place of state remedies except in extraordinary situations where otherwise the accused

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[25] *Ex parte Hawk*, *supra*, at 116–17.

[26] *Powell* v. *Alabama*, 287 U. S. 45; *Urquhart* v. *Brown*, 205 U. S. 179.

[27] *Andrews* v. *Swartz*, 156 U. S. 272, 276; *In re Wood*, 140 U. S. 278, 289; *Ex parte Spencer*, 228 U. S. 652. See *Glasgow* v. *Moyer*, 225 U. S. 420, 430; *Waley* v. *Johnston*, 316 U. S. 101, 105; *Sunal* v. *Large*, 332 U. S. 174. *Bowen* v. *Johnston*, 306 U. S. 19, 27: "The rule is not one defining power but one which relates to the appropriate exercise of power."

would be "remediless."[28] It is not seemly that years after a conviction, when time has dulled memories, when death has stilled tongues, when records are unavailable, convicted felons, unburdened by any handicap to a normal presentation of any claim of unfairness in their trial, should be permitted to attack their sentences collaterally by habeas corpus because of errors, known to them at the time of trial. When it is shown by the record that a petitioner in a federal court for relief from a state conviction that involves a denial of constitutional rights has without adequate excuse failed to use an available state judicial remedy, although all such remedies are now barred to him by limitation, I think that federal courts should not intervene to correct the error.

In *Goto* v. *Lane*, 265 U. S. 393, this Court was asked to consider the issue of whether a group of prisoners, convicted of a crime in the territorial courts of Hawaii, had the right to raise in a habeas corpus proceeding brought in a federal district court alleged deprivations of their constitutional rights. The Court said: "And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute."[29] The Court found no reasons which in the exercise of a sound judicial discretion, excused the petitioners from seeking review by writ of error. Consequently, it affirmed the judgment of the district court which had refused to issue the writ. This case is a persuasive precedent in the situation now before us because the state courts of the forty-eight states

[28] *Ex parte Hawk*, *supra*, 117–18. See *Adams* v. *McCann*, 317 U. S. 269, 274; *United States ex rel. Kennedy* v. *Tyler* 269 U. S. 13, 17.

[29] *Goto* v. *Lane*, *supra*, at 402. See also *Urquhart* v. *Brown*, 205 U. S. 179; *Riddle* v. *Dyche*, 262 U. S. 333; *Craig* v. *Hecht*, 263 U. S. 255, 277.

and the territorial courts of Hawaii stood, in 1924, in similar positions in relation to the federal judicial structure. As the scope of review of this Court in criminal cases from state courts and Hawaiian territorial courts was then the same, no valid distinctions can be drawn between *Goto's* case and the situation now before us.[30]

It should not be thought that the practice which I would follow represents the sole instance in our jurisprudence of the loss of the right to press constitutional questions because of failure on the part of the individual to raise those issues properly or in time. The principle that federal constitutional questions must be properly raised in state courts before they will be considered by this Court is too well established to require citation. In a case decided this Term, *Parker* v. *Illinois*, 333 U. S. 571, Parker was held to have lost his right to raise federal constitutional questions because of state procedure which required that those questions be raised by direct appeal to the state Supreme Court. Parker appealed his case to the intermediate Appellate Court and, consequently lost any chance of an adjudication by this Court of those issues.[31]

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[30] The Act of April 30, 1900, which established a government for the Territory of Hawaii, provided that: "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." 31 Stat. 158. In 1925, the Circuit Court of Appeals for the Ninth Circuit was given power to review final decisions from the Supreme Court of Hawaii in all criminal cases ". . . wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved. . . ." 43 Stat. 936. This power is still retained and cases from the territorial courts now come to this Court only after they have been reviewed by the Ninth Circuit Court of Appeals. 28 U. S. C. § 225.

[31] See also *Central Union Co.* v. *Edwardsville*, 269 U. S. 190.

III.

It seems to me that the considerations, analogies, and precedents discussed above admit of only one answer to the basic problem of this case. This petitioner had counsel in ample time to permit a petition for certiorari to this Court. There is not a suggestion in the record of any interference, through his own disabilities or otherwise, with petitioner's right to secure, through counsel of his own choice, review of his allegedly erroneous conviction.[32] Therefore, I think that the District Court to whom this petition for a writ of habeas corpus from a conviction in a state court was presented should have refused cognizance of the writ, *sua sponte*, since the record showed that state remedies were available[33] after the alleged denial of constitutional rights and that the petitioner neglected to take advantage of those remedies.[34] "Available" as here used carries the connotation of ability and opportunity to take advantage of the state procedure.[35] Florida's failure to object to consideration of the petition for

[32] In this the case differs from *Williams* v. *Kaiser*, 323 U. S. 471, 472; *Tomkins* v. *Missouri*, 323 U. S. 485, 486; *Smith* v. *O'Grady*, 312 U. S. 329, 334.

[33] A state can leave a procedure open through its own courts by which constitutional questions may be raised at any time. If the state court passes upon the merits, this Court can review the constitutional question upon appeal or petition for certiorari. *Herndon* v. *Lowry*, 301 U. S. 242, 247. See *Lovelady* v. *Texas*, 333 U. S. — (cert. granted), *id.* 333 U. S. — (dismissed), *Ex parte Lovelady*, 207 S. W. 2d 396.

[34] I would not here decide whether or not this rule applies to cases which are governed by the principle of *Moore* v. *Dempsey*, *supra*, or to the situation in which a state attempts to interfere improperly with the Federal Government.

[35] For example, if Wade had not been able to obtain counsel until too late for an appeal, appeal would not have been a remedy "available" to him. See *Price* v. *Johnston*, — U. S. —; *De Meerleer* v. *Michigan*, 329 U. S. 663; *Downer* v. *Dunaway*, 53 F. 2d 586, 589–91.

habeas corpus because certiorari was not requested cannot have the effect of authorizing a federal court to examine into the validity of the conviction. The reason for not allowing habeas corpus in such cases does not depend upon state acquiescence but upon the federal judicial policy of non-interference with state criminal administration unless there has been complete use and final exhaustion of state remedies.

On the hypothesis that the decision of the Florida Supreme Court dismissing Wade's appeal from the order of the Circuit Court of Palm Beach County, Florida, was entered on the ground that the remedy in Florida for the denial of the right to counsel was by appeal instead of habeas corpus, Wade stands in no better position. If that was the real basis of the dismissal of the appeal, Wade failed to avail himself of the remedy of appeal then open to him in Florida, though now foreclosed by limitation. No doubt his counsel by motion could have obtained a ruling from the Florida Supreme Court as to whether their dismissal was on a federal or state ground in view of the then rule of this Court in *Ex parte Hawk, supra*, at 117, that an applicant for habeas corpus in federal courts must exhaust state remedies including appeal or certiorari to this Court. This would have permitted Wade to bring his constitutional question here for review under a regular course of procedure. If the Florida Supreme Court had refused a clarifying order, this Court would have had resources for reaching a conclusion in such a situation. See *Loftus* v. *Illinois*, No. 59, this Term. Consequently, I think that the judgment of the Circuit Court of Appeals should be affirmed and the case remanded to the District Court with instructions that the petition for habeas corpus be dismissed.

THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join in this dissent.